FILED

No. 97 836 NOV 19 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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November 19, 1997

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QUESTION PRESENTED

Section 401(a)(1) of the Clean Water Act requires a State water quality certification as a condition precedent to a federal license authorizing an activity that may result in a discharge into that State's waters.

Is a license amendment authorizing an activity that alters an existing discharge, by reducing the flow of water over a hydroelectric dam, excused from such State certification requirement merely because the alteration does not involve the addition of a substance to the water?

LIST OF PARTIES AND *AMICI*

PETITIONERS:

State of North Carolina
Roanoke River Basin Association

RESPONDENT:

Federal Energy Regulatory Commission

INTERVENOR:

City of Virginia Beach, Virginia

***AMICI*:**

The United States

Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming (in support of Petitioner North Carolina)

Virginia (in support of Respondent Federal Energy Regulatory Commission)

American Public Power Association
Edison Electric Institute
National Hydropower Association

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-

State of North Carolina,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

The State of North Carolina petitions for a writ of certiorari to review the May 9, 1997 decision of the United States Court of Appeals for the District of Columbia Circuit holding that the State water quality certification requirement of Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) ("Section 401(a)(1)"), applies only to activities that would add a substance to the State's waters, and not to activities that would otherwise affect those waters by altering an existing discharge.

OPINIONS BELOW

The opinion of the Court of Appeals, published on May 9, 1997 and reported at 112 F.3d 1175, together with the Court's judgment entered the same day, is reproduced in the Appendix at 1a-48a. The Court's prior orders remanding the

case to the Federal Energy Regulatory Commission ("FERC"), dated September 11, 1996 and September 19, 1996, are reproduced at 49a-54a. The Court's August 21, 1997 orders denying the petitions for rehearing and the Suggestions for Rehearing *In Banc* are reproduced at 130a-133a. The FERC orders under review are reported at *Virginia Electric & Power Co., Project No. 2009-003*, 72 FERC ¶ 61,075 (1995); *Virginia Electric & Power Co., Project No. 2009-008*, 72 FERC ¶ 61,283 (1995); and *Virginia Electric & Power Co., Project No. 2009-010*, 77 FERC ¶ 61,138 (1996), and are reproduced at 55a-129a.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the May 9, 1997 decision of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the Court's August 21, 1997 orders denying rehearing as required by Supreme Court Rule 13.

STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), provides, in pertinent part, that

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with [*inter alia*, State water quality standards promulgated under 33 U.S.C. § 1313]. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived . . . . No license or

> permit shall be granted if certification has been denied by the State . . . .

Section 401 (33 U.S.C. § 1341), and the other sections of the Clean Water Act referred to therein (*viz.*, 33 U.S.C. §§ 1311, 1312, 1313, 1316 and 1317), are reproduced in full in the Appendix at 140a-189a.

The statutory definitions of the terms "discharge," "discharge of a pollutant" and "discharge of pollutants," "pollutant" and "pollution" (33 U.S.C. §§ 1362(16), (12), (6) and (19)) are reproduced in full in the Appendix at 190a-193a.

STATEMENT OF THE CASE

Procedural History

Petitioner, the State of North Carolina, challenges two orders of FERC that amend an existing hydroelectric project license. The license is held by Virginia Electric and Power Company ("VEPCO") and authorizes the operation of the Roanoke Rapids and Gaston Hydropower Project (the "Hydro Project"), located on the Roanoke River.[1] The Hydro Project dam creates a large body of water, Lake Gaston, which is located primarily in North Carolina and partly in Virginia. The dam and power generating station are located entirely within North Carolina. The water discharging over the dam and through the turbines into the Roanoke River is agreed by all parties, including FERC, to be a "discharge" that "originates" in North Carolina, as those terms are used in Section 401(a)(1) of the Clean Water Act.

The FERC license amendment permits the City of Virginia Beach, Virginia to build an intake structure 300 yards

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[1] The license was originally issued to VEPCO by the Federal Power Commission, FERC's predecessor agency, pursuant to Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e) (134a-135a)) on January 24, 1951, as amended on March 25, 1960 (23 FPC 537 (1960)), for a term of 50 years (10 FPC 1 (1951)), and expires on January 31, 2001.

north of the North Carolina border in a small tributary of Lake Gaston (in Virginia); reverse the tributary's flow; draw up to 60 million gallons of water per day ("mgd") upstream from the main body of the lake (in North Carolina); and transport the water across two river basins through a 76-mile pipeline and various municipal systems for use mainly in Virginia Beach, Virginia (the "Pipeline Project"). The water withdrawn will equal almost ten percent of the river's flow during periods of low flow, when water quality is at greatest risk. Thus, there will be a major alteration in the discharge from the Hydro Project in North Carolina.

VEPCO did not seek or obtain a Section 401(a)(1) certification from North Carolina that the altered discharge would comply with its water quality standards. FERC nonetheless issued the license amendment, over North Carolina's objection. FERC acknowledged that the discharge at the dam would be altered, but held that the Pipeline Project itself did not result in a "discharge" in North Carolina because it did not add any substance to the water flowing over the dam. FERC therefore held that the certification requirement of Section 401(a)(1) did not apply.[2]

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[2] FERC initially rendered a decision which "assum[ed], *arguendo*" that the amendment was subject to Section 401(a)(1), but held that North Carolina's Section 401(a)(1) rights were nullified by a FERC regulation (18 C.F.R. § 4.38(f)(7)(iii) (194a-196a)) limiting State certification rights to circumstances where FERC finds a "material adverse impact" on water quality in the discharge. *Virginia Elec. & Power Co., Project No. 2009-003*, 72 FERC ¶ 61,075, at 61,393-94 (67a-68a) (1995), *reh'g denied*, *Virginia Elec. & Power Co., Project No. 2009-008*, 72 FERC ¶ 61,283 (1995). After briefing and oral argument, the panel hearing the case remanded it to FERC for determination whether the license amendment was in fact subject to Section 401(a)(1). On remand, FERC found that the amendment was not subject to Section 401(a)(1) because the alteration in the discharge did not

(Footnote continued)

North Carolina petitioned for review of the FERC decision.[3] Forty States filed briefs *amici curiae* in support of North Carolina's argument that FERC had no authority to issue the license amendment without a Section 401(a)(1) certification from North Carolina.[4] The Court of Appeals affirmed over a dissent by Circuit Judge Wald, and rehearing was denied.

Section 401(a)(1) and the Clean Water Act

Congress' fundamental purpose in enacting the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b) (137a). Section 401(a)(1) of the Act requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" stating that the discharge "will comply with the applicable" Clean Water Act and State water quality standards.[5]

(Footnote continued)

involve the addition of a substance to the water. *Virginia Elec. & Power Co., Project No. 2009-010,* 77 FERC ¶ 61,138 (1996).

[3] North Carolina invoked the jurisdiction of the Court of Appeals pursuant to 16 U.S.C. § 825*l*(b), which states that any party aggrieved by a FERC order issued under the Federal Power Act may obtain a review.

[4] The States' briefs are reproduced in the Appendix at 197a-263a.

[5] "Discharge," its lesser included terms, "pollutant" and "pollution" are defined as follows:

> The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16).

> The term "discharge of a pollutant" and the term

(Footnote continued)

This requirement of State certification is central to the Clean Water Act. Through Section 401(a)(1), Congress conferred upon the States -- not the federal government -- the primary authority and responsibility to protect the quality of the nation's waters:

> The states remain, under the Clean Water Act, the "prime bulwark in the effort to abate water pollution," and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law. . . .
>
> One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act. . . . Through

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(Footnote continued)

> "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12).

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

> The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

33 U.S.C. § 1362(19).

> this requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991) (citations omitted).

Short of blocking a water project, a State may also impose conditions that must be incorporated in the federal license or permit. Section 401(d), 33 U.S.C. § 1341(d); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 707-08, 711-12 (1994); *American Rivers, Inc. v. FERC*, Nos. 1169, 1170, 1171, 1172, Dockets 96-4110L, 96-4112CON, 96-4116CON, 96-4118CON, 1997 WL 691043 (2d Cir. Nov. 5, 1997).[6] Thus, Section 401(a)(1) embodies a principle of federalism established by Congress *(see District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980)), and confers on the States authority which cannot lawfully be abrogated by a federal court or agency.

The Court of Appeals Decision

a. *The majority decision*

The panel majority assumed *arguendo* what the parties already agreed: that the flow of water through the Hydro Project turbines in North Carolina is a statutory "discharge." 112 F.3d at 1187 (16a). The majority nonetheless held that North Carolina had no Section 401(a)(1) rights with respect to the Hydro Project license amendment authorizing the Pipeline Project, because the Pipeline Project would not result in the "addition" of a "substance" to the water. *Id.* at 1187-89 (16a-20a).

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[6] A State's exercise of its certification power is not reviewable by a federal court or agency; review lies only in the courts or agencies of the State. *E.g., American Rivers*, 1997 WL 691043, at *8; *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

The majority's analysis relied upon the statutory definition of "discharge," which states that "'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." *Id.* at 1187 (17a). The court noted that these latter terms are defined by reference to the "addition" of a "pollutant." *Id.* The court then concluded that the general term "discharge" is limited by the definition's "statement of inclusion":

> [A]lthough the focus of the definitional section is on the regulation of pollutants rather than the general regulation of project discharges, the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word "discharge" contemplates the addition, not the withdrawal, of a substance or substances.
>
> On the evidence of record, the operation of the Pipeline Project will not result in the "addition" of anything to the waters of Lake Gaston. . . . A decrease in the volume of water passing through the dam turbines cannot be considered a "discharge" . . . .

Id. at 1187-88 (17a-18a) (footnote omitted).

The court went on to conclude that alteration of a discharge that is "already in existence" cannot give rise to Section 401(a)(1) rights:

> Stating that operation of the Pipeline Project will "result in an altered discharge" is simply a way of saying in legalese that operation of the Pipeline Project will alter the discharge. However, the existence of certification rights under Section 401(a)(1) does not depend on whether a discharge is "altered." Section 401(a)(1) certification rights vest only if

> an activity "may result in" a discharge. . . . The word "alter" means to change something from its previous state, WEBSTER'S NEW INT'L DICTIONARY 63 (3rd ed.1961) ("to cause to become different"), implying that the thing changed was already in existence. By contrast, the word "result" implies causation. *See id.* at 1937 ("arise as a consequence"). Obviously, a subsequent event cannot be the cause of something that is already in existence.

Id. at 1188 (18a-19a).

b. *The dissent*

Circuit Judge Wald dissented, stating that the majority opinion "ignores the language, structure, and purpose of the Act, and wrests away from North Carolina the very power to make water quality judgments about its own waterways that Congress expressly meant for that State alone to have." 112 F.3d at 1195 (33a).

> The § 401 certification right is an essential component of the Act's state-oriented regulatory scheme. Obviously, how courts construe the Act's language specifying those situations in which States may wield this powerful weapon can critically affect their ability to protect the integrity of their waters in the way Congress intended. Too stingy an interpretation of § 401(a)(1) will severely burden each State's ability to implement the water quality program mandated by the Act, and will frustrate Congress' clear intent to institute a system under which States carry both the responsibility of setting their own water quality standards and a corresponding power to protect those standards

> from federally-licensed activities that threaten to undermine them.

Id. (citation omitted).

The dissent finds the majority's conclusion "paradoxical" in that

> it appears that North Carolina will wield a § 401(a)(1) certification right in 2001,[7] when the project's license will expire and VEPCO will request a new license. Yet the majority reaches the paradoxical conclusion that FERC may approve this license amendment, which all parties concede will alter the North Carolina "discharge," without requiring any certification from North Carolina. . . . Logically, if a State must consent before a new discharge is introduced into its waters, then a change in that discharge must require a new consent.

Id. at 1195-96 (34a-35a) (citation omitted).

The dissent describes the majority's holding as a "sweeping and arbitrary limitation on State certification rights" which "badly distorts the definitions section of the Act, and improperly usurps crucial judgments on water quality that Congress reserved for the States into which the discharges flow." *Id.* at 1196 (35a-36a). The dissent finds the majority's statutory analysis fundamentally flawed in

> its insistence that "near[er]" evidence of Congress' "definitional intent" as to what constitutes a discharge can be found by looking at the Act's definition of the phrase "discharge of a pollutant" than by relying on the Act's own

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[7] All parties agree that VEPCO must obtain North Carolina's certification in order to obtain a new license in 2001, even if the new license does not authorize any change in the discharge.

> definition of the very term under discussion -- "discharge." The Act expressly states that the term "'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The only inference I can discern from this clear expression of nonexclusivity in the definition of "discharge" is that it was meant to encompass a wider array of interferences with the navigable waters than would qualify as "discharges of pollutants."

Id. at 1196-97 (36a-37a).

The dissent also finds the majority's "'substance-adding'" test to be fundamentally inconsistent with the structure of the Act and its regulation of "pollution":

> Section 304 of the Act "expressly recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . .'" *PUD No. 1*, 511 U.S. at 719-20, 114 S.Ct. at 1913 (quoting 33 U.S.C. § 1314(f)). . . .
>
> The majority's niggardly construction of the term "discharge" threatens a congressional policy permeating the general structure of the Act . . . . When a federally-licensed activity would "result in" a "discharge" into the State's waters, the decision whether that interference with the State's waters would be tolerated was to belong solely to the State in which that discharge originated, not to a federal agency or to a federal court. . . . Interferences with the integrity of a waterway need not take the archetypal form of sludge spewing from an outfall; other changes can be just as deadly to

> fish and other wildlife as are toxic chemicals. For example, alterations that cause the temperature of the water in a discharge to rise, or that rearrange the spatial distribution of oxygen, sediment, or minerals in the downstream water, could be catastrophic from the perspective of water quality. Yet the effect of this court's decision will be to bar States in which altered discharges originate from acting to protect their waters from such pernicious effects, whenever the alteration does not "add" any "substance or substances" to the water. I do not believe Congress intended to give this court's essentially *ad hoc* and inevitably inexpert judgments precedence over the expert judgments of the States' water quality authorities, in the making of such crucial determinations.

Id. at 1196-98 (36a-40a) (citation omitted) (footnote omitted).

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Water resource policy and water quality management are among the most vital issues of our times. The Court of Appeals decision fundamentally alters the balance of power between the States and the federal government, contrary to an express Congressional determination that the States -- not the federal government -- have primary responsibility for ensuring the quality of water within their borders. Congress further determined that both State and federally licensed projects must meet the water quality standards adopted by the States, which Congress expressly authorized to be more stringent than federal

standards. Section 401 is the mechanism through which a State ensures that a federally licensed project meets that State's standards. *Keating*, 927 F.2d at 622.

This broad scope of State authority under Section 401 was reaffirmed by the Second Circuit only two weeks ago in *American Rivers*. *American Rivers* confirms that FERC may not "second-guess" or "substitute its own judgment for that of the certifying [State]." 1997 WL 691043, at *9. Acknowledging the "special expertise" of State certifying agencies, the Second Circuit admonished that FERC "does not possess a roving mandate to decide that substantive aspects" of State water quality judgments may be ignored. *Id.* at *9-*10.

The decision below subordinates the primacy of State water quality judgments to those of the federal government. If the decision is allowed to stand, States will be stripped of their ability to preserve water quality in one of the most critical areas of environmental concern, *i.e.*, regulation of the flow of water over hydroelectric project dams. Regulation of dams is critical to preservation of our nation's rivers because dams change the entire character of their host river systems. Changes to the character of downstream flows (whether changes in quantity, temperature, timing, velocity or oxygen content) pose significant risks to water quality and thus to all environmental, recreational and industrial river uses.

There are more than one thousand hydroelectric dams in the United States, affecting untold numbers of rivers and tributaries. The exceptional importance of this issue of State authority, extending far beyond North Carolina, is shown by the fact that forty other States have supported North Carolina's assertion of Section 401(a)(1) rights in this case.

All parties agree that the water flowing over the Hydro Project dam and into the Roanoke River is a statutory "discharge" originating in North Carolina, and that the current characteristics of that discharge will require approval by North

Carolina when VEPCO's project is relicensed. The question of fundamental importance in this case is whether the preeminent statutory power of the States to protect water quality at the time of both licensing and relicensing of federal projects is suspended in the period between those two events. The Court of Appeals has held that it is, reaching the anomalous conclusion that the States' power to protect their water quality through certification continues only where the threat is from the "addition" of a "substance."

The decision is wrong, because it both misinterprets the statutory certification requirement and is fundamentally inconsistent with *PUD No. 1*. First, the Court of Appeals misreads the statutory language by improperly equating the two separately defined statutory terms "discharge" and "discharge of pollutants." The statute expressly negates any such equation by stating that "discharge" "*includes*" a "discharge of pollutants." By requiring that a "discharge" "add" a substance simply because "discharge of pollutants" requires an addition, the majority denies the general term "discharge" any meaning of its own.

Second, the decision below is inconsistent with this Court's recognition in *PUD No. 1* that a statutory "discharge" does not require the addition of any substance to water. *PUD No. 1* is predicated on the premise that "the discharge of water at the end of the tailrace after the water has been used to generate electricity" was a statutory "discharge" subject to State certification under Section 401(a)(1). 511 U.S. at 711. In stating this premise, this Court neither expressed nor implied, nor left room for FERC to impose, any requirement that a discharge must involve the "addition" of a "substance" to water.

More fundamentally, this Court explicitly pointed out that a reduction in water quantity has a water quality effect which is also subject to State control:

> [W]ater quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, ... [T]here is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. . . . Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams."

Id. at 719-20 (citation omitted).

The majority's view that activities which result in "[a] decrease in the volume of water" cannot be subject to State certification (112 F.3d at 1188 (18a)) is inconsistent with this Court's recognition in *PUD No. 1* of the relationship between water quantity and water quality. A reduction in water quantity will increase the concentration of those substances that are already in an existing discharge or in the body of water into which the discharge flows.[8] This is scientifically and practically equivalent to adding substances to water. That is why States

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[8] Although the instant case involves a single water withdrawal project, the majority's decision would permit FERC to authorize any number of additional withdrawals from the Hydro Project as well as any number of other withdrawals from other hydroelectric dams, without regard to the effect on water quality at and downstream of those dams. Host States would not have Section 401(a)(1) rights with respect to any of the related license amendments. It is that prospect that concerns North Carolina and the *amici* States as much as the direct impact of the Pipeline Project.

commonly impose minimum flow requirements as conditions to certification of hydroelectric projects, and why States are concerned about activities (such as withdrawals) that impact the quantity and flow of water. That is also why *PUD No. 1* expressly holds that a State may condition a Section 401(a)(1) certification for the discharge of water over a hydroelectric project dam on the maintenance of State-specified minimum flows.

The majority's conclusion is further undermined by the statutory definition of "pollutant," which recognizes that pollutants need not be "substances," and therefore that even a "discharge of a pollutant" need not result in the addition of a "substance" to the water. For example, "heat" -- which is a condition, not a substance -- is defined as a "pollutant," because, as Judge Wald noted (112 F.3d at 1198 (39a-40a)), raising the temperature of water can have the same deleterious effects on water quality as the deposit of a harmful substance.

The majority's notion that an "altered discharge" cannot trigger the certification requirement because a discharge "is already in existence" (*id.* at 1188 (18a-19a)) is belied by the statutory language. Section 401(a)(1) refers to "any discharge" that "originates ***or will originate.***" While a discharge that "will originate" clearly refers to a new discharge, a discharge that "originates" in the State at the time of certification is equally clearly a discharge that is already "in existence." Congress' use of the phrase "***any*** discharge" further supports the conclusion that altered discharges, as well as "new" discharges, are subject to Section 401(a)(1) certification. Clearly, an "altered discharge" may "result" from a newly authorized activity. As both the Court of Appeals and FERC have recognized, that is exactly what has happened in this case: new activities

authorized by the license amendment will result in an altered discharge.[9]

The majority's failure to recognize that Section 401(a)(1) applies to altered discharges places its decision squarely in conflict with the result in *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109 (4th Cir. 1989). That case involved the construction of a powerhouse project at an existing dam. The powerhouse project (which included authorization to withdraw 1 mgd from the impoundment) would alter the flow of water over the dam. That alteration triggered a requirement of certification under Section 401(a)(1) by the Commonwealth of Virginia. Because a FERC license was issued in the absence of such a certification, the Fourth Circuit reversed. Under the majority's decision here, Virginia's certification would not have been required because the discharge at the dam was "preexisting" and the powerhouse project would not "add" a "substance" to the water.

CONCLUSION

The Court of Appeals has decided an important question of federal law presenting an issue of critical importance to management of this country's water resources in a manner inconsistent with controlling precedent. If allowed to stand,

[9] As the Second Circuit just held, the Clean Water Act explicitly recognizes that even after a discharge is reviewed and certified, a certifying State has an interest which must be protected if the circumstances surrounding the discharge change. *American Rivers*, 1997 WL 691043. Similarly, Section 401(a)(3) of the Act permits a State that has issued a Section 401(a)(1) certification for a federal construction permit nonetheless to block a federal operating permit for the same discharge by revoking its certification on the grounds that, *inter alia*, there are changes in the operation of the facility or in the characteristics of the waters into which the discharge is made. In contrast, the majority decision renders a State powerless to deal with fundamentally changed circumstances that directly affect the quality of the water in and downstream of the discharge.

the decision will fundamentally alter the Congressionally mandated balance of power between the federal and State governments, and thereby seriously jeopardize the ability of the States to ensure the quality of the nation's waters. For these reasons, the petition for a writ of certiorari should be granted.

November 19, 1997

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APPENDIX

STATE OF NORTH CAROLINA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

The City of Virginia Beach,
Virginia, Intervenor.

Nos. 95-1494, 95-1500.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 4, 1997.

Decided May 9, 1997.

[Synopsis and Headnotes Omitted]

On Petitions for Review of an Order of the Federal Energy Regulatory Commission.

Bernard Nash and Patrick M. McSweeney argued the causes for petitioners, with whom Frederick M. Lowther, David L. Engelhardt, William B. Ellis and Alan S. Hirsch, Special Deputy Attorney General, North Carolina Department of Justice, Washington, DC, were on the briefs.

Edward S. Geldermann, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent, with whom Jerome M. Feit, Solicitor, was on the brief.

M. Scott Hart, Washington, DC, argued the cause for intervenor City of Virginia Beach, with whom George A. Somerville and Samuel M. Brock, III were on the brief. Howard E. Shapiro, Michael A. Swiger and John F. Kay, Jr. entered appearances.

Lois J. Schiffer, Assistant Attorney General, United States Department of Justice, John A. Bryson, Attorney, Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Randolph L. Hill, Attorney, were on the brief for the United States as amicus curiae.

John Paul Woodley, Jr., Roger L. Chaffe and John R. Butcher were on the brief for the Commonwealth of Virginia as amicus curiae.

Alan H. Richardson, Donald H. Clarke and Henri D. Bartholomot were on the joint brief for the American Public Power Association, et al., as amicus curiae.

Ronald A. Shems, Assistant Attorney General, State of Vermont, was on the brief for the states of Vermont, et al., as amicus curiae.

Before: WALD, SILBERMAN and SENTELLE, Circuit Judges.

Dissenting opinion filed by Circuit Judge WALD.

SENTELLE, Circuit Judge:

Petitioners, the state of North Carolina and the Roanoke River Basin Association ("RRBA"), seek review of the decision of the Federal Energy Regulatory Commission ("FERC" or "Commission") to amend a FERC license under which a power project is operated within Lake Gaston on the Roanoke River. The amended license allows the City of Virginia Beach, Virginia to build an intake structure within the power project's boundaries and withdraw water for transport to Virginia Beach. Petitioners maintain that FERC improperly issued the license amendment without first requiring that a water quality certification be obtained from the state of North Carolina. Petitioners further contend that the decision to issue the license amendment was arbitrary and capricious. For the reasons detailed below, we reject each of these arguments and deny the petitions for review.

I. Background

This case arises from the nearly fourteen-year effort of Virginia Beach to secure a new source of water *via* a 76-mile pipeline originating at Lake Gaston and terminating in Norfolk, Virginia (the "Pipeline Project"). Lake Gaston is located on the Roanoke River, a navigable waterway traversing the states of Virginia and North Carolina. While Lake Gaston is primarily located in North Carolina, the intake structure for the Pipeline Project is to be located at Pea Hill Creek Cove in Virginia. That site is within the boundaries of FERC Project No. 2009, a FERC-licensed power project (the "Power Project") operated by Virginia Electric and Power Company ("VEPCO"). Upon completion of the Pipeline Project, Virginia Beach will be able to draw up to 60 million gallons per day ("mgd") of water from Lake Gaston, reducing the discharge of water through the Power Project's dam turbines in North Carolina by that same amount. The drawn water will then be transported through a 76-mile pipeline. This will result in a net increase of 54 mgd of water to Virginia Beach's daily water supply, after adjustment for amounts lost during transport.

Construction of the Pipeline Project's intake facility was to result in sediment discharges into the waters of Lake Gaston. As a result, Section 403(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, otherwise known as the Clean Water Act ("CWA" or "Act"), required Virginia Beach to obtain a dredge-and-fill permit from the Secretary of the Army, acting through the Army Corps of Engineers ("Corps"). 33 U.S.C. § 1344(f)(2). The City filed its application for a Section 403(a) permit with the Corps on July 15, 1983.

Section 401(a)(1) of the CWA provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the . . . permitting agency a certification from the State in which the discharge originates or will originate. . . ." The certification must provide that the discharge "will comply with the applicable" water quality

standards. *Id.* § 1341(a)(1). As for those states in which the discharge does not "originate" but which may otherwise be "affected" by the discharge, Section 401(a)(2) of the CWA provides a separate set of procedures to ensure compliance with the affected state's water quality standards. *Id.* § 1341(a)(2).

Because the Corps' dredge-and-fill permit is a "Federal license or permit" for purposes of Section 401(a)(1), Virginia Beach was required to obtain a water quality certification from the state of Virginia. Accordingly, Virginia Beach filed an application with the Virginia State Water Control Board ("VSWCB"), requesting certification of the withdrawal of up to 60 mgd of water from Lake Gaston. No certification was sought or received from North Carolina at this time. On September 12, 1983, the VSWCB issued a Section 401(a)(1) certification for the Pipeline Project, subject to certain conditions needed to preserve water quality.

Following the issuance of the water quality certification, the Corps held public hearings on Virginia Beach's application for a dredge-and-fill permit. Both North Carolina and RRBA intervened in this proceeding. Upon conclusion of the hearings, the Corps found that 60 mgd would be needed in the Virginia Beach area by the year 2030, that the Pipeline Project would have no noticeable impact on downstream water quality, and that the project would have no significant impact on the environment. As a result, the Corps issued a dredge-and-fill permit to Virginia Beach. The issuance of this permit was ultimately upheld on appeal. ***North Carolina v. Hudson***, 665 F.Supp. 428 (E.D.N.C.1987), ***appeal decided after remand***, 731 F.Supp. 1261 (E.D.N.C.1990), ***aff'd sub nom. Roanoke River Basin Ass'n v. Hudson***, 940 F.2d 58 (4th Cir.1991), ***cert. denied***, 502 U.S. 1092, 112 S.Ct. 1164, 117 L.Ed.2d 411 (1992).

In 1991, VEPCO filed an application with FERC, requesting that the Power Project license be amended to permit the withdrawal of water for the Pipeline Project. The license for the Power Project was initially issued in 1951 by the Federal

Power Commission, the predecessor of FERC. *Virginia Elec. and Power Co., Project No. 2009: Application for License Under Federal Power Act,* 10 F.P.C. 1 (1951) [hereinafter *License Application Order*]. The Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*, governs amendments to FERC licenses and provides that an amendment may be granted "only upon mutual agreement between the licensee and the Commission after thirty days' public notice." 16 U.S.C. § 799. Under VEPCO's requested amendment to the Power Project license, Virginia Beach would be permitted to withdraw 60 mgd of water from Lake Gaston, decreasing the flow of water through the Power Project dams by the same amount.

North Carolina intervened in the license amendment proceeding and requested that FERC prepare an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* On July 23, 1993, FERC issued a draft environmental assessment ("EA") tentatively concluding that the Pipeline Project would have no unmitigable adverse environmental impacts. After receiving numerous comments on the draft EA, FERC staff, on June 23, 1994, issued a final EA finding that the proposed Pipeline Project "constitutes a major federal action significantly affecting the quality of the human environment." As a result, FERC determined to prepare an EIS to "reflect updated population and water consumptive projections." In the meantime, North Carolina had petitioned the Commission to stay its proceeding until VEPCO obtained a Section 401(a)(1) certification from North Carolina's water control agency. The Commission took no action on the stay request.

On July 7, 1995, FERC issued a final EIS finding that the five-city area in the vicinity of Virginia Beach (including Chesapeake, Norfolk, Portsmouth, Virginia Beach, and Suffolk) will need 54 mgd of water by the year 2030; that the proposed water supply project will ensure Virginia Beach a safe, reliable, and relatively inexpensive source of potable water; that the Pipeline Project is the best source for meeting that water need;

and that the project, subject to additional mitigation measures, should be approved. Final Environmental Impact Statement for Virginia Beach Water Supply Project at xxii [hereinafter Final EIS]. On July 14, 1995, North Carolina and RRBA filed a joint motion asking the Commission to condition any order approving the Project on North Carolina's issuance of a water quality certification pursuant to CWA § 401(a)(1). The Commission took no action on this motion.

Finally, on July 26, 1995, the Commission issued an order approving VEPCO's application to amend the license under which the Power Project is operated. *Virginia Elec. and Power Co., Project No. 2009-003: Order Approving Non-Project Use of Project Lands and Waters and Amending License*, 72 F.E.R.C. (CCH) ¶ 61,075 (July 26, 1995) [hereinafter *License Amendment Order*]. In the order, the Commission concluded that Virginia Beach's project is "best adapted to a comprehensive plan for improving or developing the waterway for beneficial public purposes" because Virginia Beach will "be relieved of the serious water supply problems that have severely constrained the lifestyle of its citizens and clouded its economic future." *Id.* at 61,399. Relying on the findings of its Final EIS, the Commission concluded that by the year 2030 Virginia Beach and the other regional cities will need the entire 54 mgd that the Pipeline Project is designed to provide. *Id.* at 61,396. In addition, the Commission concluded that the downstream effects of the Pipeline Project withdrawals could be sufficiently mitigated by the release of the water the city had stored upstream in Kerr Reservoir. *Id.* at 61,398.

The Commission denied petitioners' request to stay its proceeding or to withhold its approval until North Carolina issued a Section 401(a)(1) certification for the Project. *Id.* at 61,393. The Commission ruled that "even assuming, *arguendo*, that the proposed amendment to the [Power Project] license to accommodate the construction and operation of Virginia Beach's water supply project is subject to the provisions of Section 401(a)(1)," the certification requirement was not

triggered because the Commission's regulations require a new certification only for license amendments that will cause a "'material adverse impact on the water quality in the discharge from the project.'" *Id.* at 61,393-94 (quoting from 18 C.F.R. § 4.38(f)(7)(iii)). Relying on the findings and conclusions of its Final EIS, the Commission concluded that a one-percent reduction in flow releases into the Roanoke River from the project dam "will not significantly affect water quality." *Id.* at 61,394.

Petitioners moved for rehearing. On September 22, 1995, the Commission denied the motion. *Virginia Elec. and Power Co., Project No. 2009-008: Order Denying Rehearing and Denying Stay*, 72 F.E.R.C. (CCH) ¶ 61,283 (Sept. 22, 1995) [hereinafter *Rehearing Order*]. The Commission found that the need for a reliable water source in the area surrounding Virginia Beach "cannot be disputed." *Id.* at 62,216. Further, the Commission reaffirmed its prior ruling that a Section 401(a)(1) certification was not required because VEPCO's license amendment would not have a "material adverse impact on the water quality in the discharge from the project." *Id.* at 62,218. Alternatively, the Commission held that North Carolina had waived its Section 401 certification claim. *Id.* at 62,219.

Petitioners then sought review in this court, challenging FERC's decision to issue the amended license. According to petitioners, FERC violated CWA § 401(a)(1) by issuing the amended license without receiving a water quality certification from North Carolina. In addition, petitioners asserted that certain of FERC's findings necessary to justify issuance of the amended permit were arbitrary and capricious.

After the first oral argument in this case, we issued an order remanding the record and directing the Commission to determine whether the license amendment would involve "activities . . . which may result in any discharge into the navigable waters" that "originate" in North Carolina within the meaning of CWA § 401(a)(1). *See North Carolina v. FERC*,

No. 95-1494 (D.C.Cir. Sept.11, 1996) (order remanding record to the Commission). On remand, the Environmental Protection Agency ("EPA" or Agency") filed a letter with FERC stating that, in its view, the license amendment authorizing the Pipeline Project would result in such a discharge, thus necessitating a Section 401(a)(1) certification from North Carolina. Letter from Jonathan Z. Cannon, General Counsel, EPA, to Lois D. Cashell, Secretary, FERC 1 (October 24, 1996) [hereinafter EPA Letter].[1]

On November 7, 1996, FERC issued an order in which it concluded that "the activity that the Commission approved in this proceeding (the construction and operation of facilities and withdrawal of water from the Virginia Beach water supply project) is not an activity that results in a discharge originating in the State of North Carolina within the meaning of Section 401(a)(1) of the CWA." *Virginia Elec. and Power Co., Project No. 2009-010: Order on Remand,* 77 F.E.R.C. (CCH) ¶ 61,138 (Nov. 7, 1996) [hereinafter *Order on Remand*]. More specifically, the Commission found that the construction and operational activities (and any resulting discharges originating therefrom) would occur entirely in Virginia. *Id.* at 61,518. Because Virginia Beach obtained a Section 401(a)(1) certification from the state of Virginia, the Commission determined that the requirements of CWA § 401(a)(1) were satisfied. *Id.* at 61,521. We now review the Commission's orders.

II. Analysis

A. Section 401(a)(1) Certification Claim.

Petitioners first challenge the Commission's conclusion that Section 401(a)(1) does not require that VEPCO obtain a water quality certification from the state of North Carolina

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[1] Because we conclude, under the first step of *Chevron*, that congressional intent underlying Section 401(a)(1) is clear, *infra*, we find it unnecessary to resolve the thorny question as to whether EPA is entitled to deference as the arguably primary administrator of the CWA.

before issuing an amendment to VEPCO's license. When reviewing "an agency's construction of the statute which it administers," we apply the two-part test developed by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first step of the *Chevron* test is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Id.* at 842, 104 S.Ct. at 2781. If, however, the congressional intent is not clear, we must then ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. at 2782. As discussed in more detail below, we conclude that the congressional intent underlying Section 401(a)(1) of the CWA is clear and unambiguous.

1. Waiver

Before turning to the merits of petitioners' Section 401(a)(1) claim, we first address FERC's argument that North Carolina waived its certification right by failing to assert such during the Corps' dredge-and-fill permit proceeding. The Commission's waiver argument is premised on the view that, under Section 401(a)(1), it is a state's duty to request that a license applicant obtain a water quality certification. *See* FERC's Brief at 40 (referring to North Carolina's failure "to assert a timely ***request*** for [a water quality] certification" (emphasis added)). The Commission plainly misconstrues Section 401 in this respect.

Section 401(a)(1) provides that "[n]o license or permit shall be granted until the certification required by this section has been obtained or waived ***as provided in the preceding sentence.***" 33 U.S.C. § 1341(a)(1) (emphasis added). The referenced preceding sentence states that a waiver occurs when a "State . . . fails or refuses to act ***on a request for certification***, within a reasonable period of time (which shall not exceed one year) after receipt of such request." *Id.* (emphasis added). This language clearly expresses a congressional intent to place the

burden of requesting a state water quality certification on the license applicant. Only after a request has been made can a state waive its certification right, and then only by refusing to respond to the request within a reasonable period of time. VEPCO, the license applicant in this case, never requested that North Carolina provide a water quality certification for the proposed Pipeline Project. Therefore, under the plain language of Section 401(a)(1), North Carolina could not have waived its certification right.

Despite the clarity of Section 401(a)(1), FERC proposes two theories--one statutory and one common law--on which to base a finding of waiver. First, the Commission argues that CWA § 401(a)(3) creates an alternative means by which a state can waive its certification right. Section 401(a)(3) provides that "[t]he certification obtained pursuant to [CWA § 401(a)(1)] with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other federal license or permit required for the operation of such facility." 33 U.S.C. § 1341(a)(3). As the Commission reads Section 401(a)(3), any state having certification rights as to the operation of a licensed activity must intervene and assert those rights at the time a license is granted to construct the facilities. Failure to intervene at the time a construction license is granted will, according to FERC, result in a waiver of the right to certify the operation of the project. In support of this argument, the Commission cites *Keating v. FERC*, 927 F.2d 616, 620 (D.C.Cir.1991), in which we stated that "under section 401(a)(3) of the Clean Water Act, . . ., FERC was obliged to accept the certification underlying the Corps permit as satisfying the state certification with respect to . . . [the FERC] license application."

To be sure, Section 401(a)(3) does provide that a certification obtained during a facility's construction stage will satisfy the Section 401(a)(1) certification requirement at the project's operational stage. Section 401(a)(3) does not, however, require a state with certification rights pertaining only

to the operation of a project to assert those rights at the time a construction permit is issued for the project. By its terms, Section 401(a)(3) provides only that a construction certification actually "obtained" from a state will satisfy the certification requirement as to the operation of the project. As discussed above, no water quality certification was obtained from North Carolina at the construction stage of the Pipeline Project. Only the state of Virginia certified the Project's construction.

The Commission responds that it is irrelevant for purposes of Section 401(a)(3) that only Virginia certified the construction of the Pipeline Project. As the Commission reads Section 401(a)(3), a certification obtained at a project's construction stage from the state in which construction discharge will originate obviates the need to obtain a certification from those other states in which a discharge will originate as a result of the project's operation. To the extent a state in which an operational discharge will originate wishes to exercise its right to certify the operation of a project, that state must intervene and assert its certification rights during the construction permit proceeding. We disagree.

Section 401(a)(3) provides that obtaining a construction-stage certification satisfies the need to obtain an operational certification from "the certifying State." *See* 33 U.S.C. § 1341(a)(3). Not one word of Section 401(a)(3) in any way indicates that the construction-stage certification satisfies the need to obtain an operational certification from another state in which only an operational discharge will originate. Nor does the section require that such other state intervene in the construction permit proceeding and assert its right to certify the operation of the project. Indeed, to so hold would place the burden of requesting a certification on the certifying state directly contrary to Section 401(a)(1)'s express requirement that the license applicant initiate the "request for certification." *Id.* § 1341(a)(1).

The *Keating* case upon which FERC relies in attempting to avoid this interpretation of Section 401(a)(3) is easily

distinguishable. In *Keating*, the state of California issued a blanket certification in connection with an applicant's request for a Corps' dredge-and-fill permit. 927 F.2d at 619-20. When a party subsequently attempted to use the blanket certification to obtain a FERC license, the state purported to revoke its earlier certification. *Id.* at 620. On petition for review, we held that once a state grants certification in a dredge-and-fill permit proceeding, "section 401(a)(3) permits state revocation of the prior certification only if certain conditions are met." *Id.* at 624. Absent such conditions, "FERC was obliged to accept the certification underlying the Corps permit as satisfying the state certification requirement with respect to Keating's [FERC] license application." *Id.* at 620. In this case, as there was no "prior certification" by the state of North Carolina but only by the state of Virginia, the *Keating* case is inapposite.

The Commission's second theory of waiver is based on the common law doctrine of claim preclusion. The Commission would have us read that doctrine into Section 401(a)(1). During the dredge-and-fill permit proceeding, the Corps specifically considered the environmental impacts not only of the project construction, but also of its operation and resultant discharges in North Carolina. Further, the Corps proceedings involved the same issues, parties, and discharge as are involved in the proceeding before FERC. As a result, the Commission argues, North Carolina's failure to raise its Section 401(a)(1) certification claim before the Corps should bar it from raising the claim in this proceeding.

In response, North Carolina argues that the common law defense of claim preclusion cannot now be raised because it did not form the actual basis for FERC's order. While it is true that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency," *Securities & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577,

91 L.Ed. 1995 (1947), it appears that the Commission's order was based in part on the doctrine of claim preclusion. The Commission's *Rehearing Order* states that North Carolina's certification right was "waived" and also refers to the fact that consideration of the certification claim "would reopen an issue that has already been put to rest by the . . . Corps . . . and the courts in the *Hudson* litigation." 72 F.E.R.C. at 61,218-19. These statements indicate that FERC did rely, at least in part, on the doctrine of claim preclusion in rejecting North Carolina's certification claim.

Nevertheless, we believe that the Commission erred in reading the doctrine of claim preclusion into Section 401(a)(1). As discussed above, that section clearly provides that a Federal license or permit may not be granted "until the certification required by [Section 401(a)(1)] has been obtained or has been waived" as a result of a state's "refus[al] to act on a request" for such in a timely manner. 33 U.S.C. § 1341(a)(1). We see no room for the doctrine of claim preclusion in such a precisely worded provision. To hold otherwise would, in our view, require us to usurp the legislative function. This we cannot do.

In sum, we do not believe that North Carolina waived its certification right. We therefore turn to the merits of the certification claim.

2. Merits

Petitioners maintain that the Commission improperly interpreted Section 401 of the CWA and, as a result, erroneously issued an amended license to VEPCO without first requiring that a water quality certification be obtained from the state of North Carolina. As quoted above, Section 401(a)(1) of the CWA provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . ." 33 U.S.C. § 1341(a)(1). In the case of a license amendment, a Commission regulation interpreting this section requires the

applicant to obtain a new water quality certification only "if the amendment would have a material adverse impact on the water quality in the discharge from the project." 18 C.F.R. § 4.38(f)(7)(iii) (1995).

In the initial order granting an amendment to the Power Project license, the Commission assumed *arguendo* that the activity licensed by the amendment would result in a "discharge." However, relying on its regulation, the Commission concluded that a water quality certification from North Carolina was unnecessary given that "the amendment to the license [would] not have a 'material adverse impact on the water quality in the discharge from the project.'" *License Amendment Order*, 72 F.E.R.C. at 61,393-94 (quoting 18 C.F.R. § 4.38(f)(7)(iii)).

After the first oral argument in this case, we remanded the record to the Commission to answer the "logically antecedent" question whether the proposed amendment to the Power Project license to accommodate the construction and operation of the Pipeline Project is subject to the provisions of Section 401(a)(1). *See North Carolina v. FERC*, No. 95-1494, at 1-2 (D.C.Cir. Sept.11, 1996) (order remanding record to Commission). On remand, the Commission altered its reasoning on the Section 401(a)(1) issue, concluding that a water quality certification was unnecessary because the license amendment would not result in a "discharge" as that term is used in Section 401(a)(1). *See Order on Remand*, 77 F.E.R.C. at 61,517. Alternatively, the Commission found that "even if the word 'discharge' is ultimately determined to be broad enough to include the removal of water," the license amendment would still not be subject to the requirements of Section 401(a)(1) as "the activity involved in enabling such removal occurs entirely (i.e., for CWA purposes 'originates' in) Virginia, and not in North Carolina." *Id.* at 61,518.

As an initial matter, we note that on remand the Commission discarded 18 C.F.R. § 4.38(f)(7)(iii) as an alternative basis for upholding the decision not to require that a

water quality certification be obtained from North Carolina. As a result, we need not address the legality of that regulation despite our serious reservations concerning FERC's attempt to redefine the statutory phrase "any discharge," 33 U.S.C. § 1341(a)(1), to mean only those discharges that are "material," 18 C.F.R. § 4.38(f)(7)(iii). We need only review the Commission's interpretation of Section 401(a)(1) itself.

Petitioners argue that the Commission's orders misinterpret the requirements of Section 401(a)(1). According to petitioners, the relevant statutory "activity" is VEPCO's "substantially altered operation" of the Power Project under which less water will flow through the dam turbines thus generating less electricity. These alterations in the operation of the Power Project will, petitioner argues, "result in an altered discharge."[2] Alternatively, petitioners argue that the relevant "activity" is the operation of the Pipeline Project, which will result in "a new and different discharge." In either case, petitioners contend, a discharge "originates" at the point where water exits the dam turbines in North Carolina under the Supreme Court's holding in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). As a result, they conclude that a Section 401(a)(1) certification from North Carolina was required.

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[2] Our dissenting colleague suggests that "[l]ogically, if a State must consent before a new discharge is introduced into its waters, then a change in that discharge must require a new consent." Dissent at 1195. The logic escapes us. The statute provides that the right of certification arises from an "activity . . . which may result in any discharge. . . ." The triggering event is the causation of the discharge. Under our colleague's reasoning, a statute referring to "conduct resulting in injury" would include conduct which reduced injury. A transaction "resulting in financial loss" would include a transaction which prevented financial loss. Neither in those hypotheticals nor in this actual case does either logic or language lead us to our colleague's conclusion.

The Commission responds that the "activities" licensed in this case are the construction and operation of the Pipeline Project. The construction of the Pipeline Project resulted in a discharge of dredged material only in Virginia. The operation of the Pipeline Project, by contrast, will result in no "discharge" at all as the Project will only withdraw water from and add nothing to Lake Gaston. The fact that the amended license will result in an "altered discharge" at the North Carolina dam cannot, FERC argues, constitute a basis for granting certification rights to North Carolina. To hold otherwise would render superfluous Section 401(a)(2) governing the rights of those states affected by license amendments.

We agree with the Commission that the "activities" licensed by the amendment are the construction and operation of the Pipeline Project. As no party contends that the *construction* of the Pipeline Project resulted in a discharge "originat[ing]" in North Carolina, only the *operation* of the Project is relevant for our purposes. Even assuming *arguendo* that the flow of water through the Power Project dam turbines is a "discharge" as that term is defined in the CWA,[3] we fail to see how operation of the Pipeline will "result in any discharge."

The Lake Gaston Power Project has operated under a FERC license for many years. *See License Application Order,* 10 F.P.C. at 18-19. Under that license, water has been passing through the dam turbines. Had the license amendment not been granted, water would have continued passing through the dam turbines. The amendment does not permit VEPCO to release additional water through the turbines. It simply permits

[3] Our dissenting colleague suggests that *PUD No. 1, supra*, and *National Wildlife Fed'n v. FERC*, 912 F.2d 1471 (D.C.Cir.1990) (per curiam), compel the conclusion that we assume. While we do not interpret either of those opinions as compelling such a conclusion, since we are willing to assume so for purposes of this case, there is no point in our pursuing the distinctions at any length. Suffice it to say that we are satisfied for the reasons set forth at pp. 1188-89, *infra*, that a construction of the statutory language herein is in no way inconsistent with *PUD No. 1* or *National Wildlife*.

VEPCO "to authorize the City of Virginia Beach, Virginia to withdraw up to 60 [mgd] of water from the Project No. 2009 Lake Gaston reservoir." *License Amendment Order*, 72 F.E.R.C. at 61,400. These facts lead us to agree with FERC that the "activity" authorized by the license amendment is the operation of the Pipeline Project and its resultant withdrawal of water from Lake Gaston.

We recognize that the withdrawal of water from Lake Gaston will reduce the volume of water passing through the dam turbines. But neither the withdrawal of water from the Lake nor the reduction in the volume of water passing through the dam turbines "results in a discharge" for purposes of Section 401(a)(1). 33 U.S.C. § 1362 is the definitional section for chapter 26 of Title 33, the chapter that includes the CWA. That section does not provide an express definition of the term "discharge" but rather provides a statement of inclusion: "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16). Thus, we find useful in our analysis 33 U.S.C. § 1362(12), which defines the terms "discharge of a pollutant" and "discharge of pollutants" as "mean[ing] (A) any addition of any pollutant of navigable water from any point source, and (B) any addition of any pollutant to the waters to the contiguous zone . . . from any point source other than a vessel or other floating craft." Thus, although the focus of the definitional section is on the regulation of pollutants rather than the general regulation of project discharges, the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word "discharge" contemplates the addition, not the withdrawal, of a substance or substances.[4]

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[4] Our dissenting colleague "reject[s] the majority's 'substance-adding' threshold condition on the exercise of State certification rights." Dissent at 1196. The threshold is not ours, but Congress's. Granted, the congressional instruction of "discharge" in 33 U.S.C. § 1362(16) does not define discharge, but rather describes it as including "discharge of a pollutant" which Congress has heretofore defined in § 1362(12) as "mean[ing] . . . any ***addition*** of any

On the evidence of record, the operation of the Pipeline Project will not result in the "addition" of anything to the waters of Lake Gaston. Obviously, the withdrawal of water from Lake Gaston will add nothing; nor will the withdrawal of water from Lake Gaston increase the volume of water flowing through the turbines of the Project dams. Indeed, that is petitioners' very point; the volume of water flowing through the turbines will decrease as a result of the project. *Order on Remand*, 77 F.E.R.C. at 61,519-20. A decrease in the volume of water passing through the dam turbines cannot be considered a "discharge" as that term is defined in the CWA. *Save Our Community v. United States EPA*, 971 F.2d 1155, 1165 (5th Cir.1992) (holding that removal of water from wetlands is not a "discharge" for purposes of Section 404 of the CWA).

We are not persuaded by petitioners' argument that Section 401(a)(1) confers certification rights upon North Carolina merely because operation of the Pipeline Project will "result in an altered discharge" through the dam turbines. Stating that operation of the Pipeline Project will "result in an altered discharge" is simply a way of saying in legalese that operation of the Pipeline Project will alter the discharge. However, the existence of certification rights under Section 401(a)(1) does not depend on whether a discharge is "altered." Section 401(a)(1) certification rights vest only if an activity "may result in" a discharge. This distinction is of no small moment. The word "alter" means to change something from its previous state, WEBSTER'S NEW INT'L DICTIONARY 63 (3rd

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pollutant. . . ." (emphasis added). It would seem to us apparent that since Congress meant "discharge" to include "discharge of a pollutant" then Congress intended the word "discharge" to be defined in the inclusive use consistently with the included use. Therefore, if "discharge of a pollutant" requires addition, then the inclusive understanding of "discharge" also requires an addition. Indeed, we have seen no definition of "discharge" in any source, including the dissent, which suggests that that term includes withdrawal or reduction.

ed.1961) ("to cause to become different"), implying that the thing changed was already in existence. By contrast, the word "result" implies causation. *See id.* at 1937 ("arise as a consequence"). Obviously, a subsequent event cannot be the cause of something that is already in existence. Given the disparity between petitioners' proposed test and the words of the Act, we elect to remain faithful to the language chosen by Congress and require that an activity "result in" a discharge in order to trigger the certification requirements of Section 401(a)(1).

Our conclusion that the operation of the Pipeline Project will not result in a "discharge" is in no way inconsistent with the Supreme Court's opinion in *PUD No. 1, supra.* In that case, the state of Washington had issued a water quality certification under Section 401(a)(1) imposing a variety of conditions on the proposed project, including a minimum stream flow requirement. 511 U.S. at 709, 114 S.Ct. at 1907-08. The license applicants argued that the minimum stream flow requirement was unlawful in that it was "unrelated to the[ ] specific discharges" at issue. *Id.* at 711, 114 S.Ct. at 1908. The Supreme Court rejected this argument, stating that:

> If § 401 consisted only of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project.

Id. at 711, 114 S.Ct. at 1908-09. As the Court read Section 401, subsection (a) "identifies the category of activities subject to certification--namely those with discharges"--while subsection (d) authorizes a state to place "additional conditions on the activity as a whole once the threshold condition, the

existence of a discharge, is satisfied." *Id.* at 711-12, 114 S.Ct. at 1909. But the Court never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of Section 401(a)(1). *PUD No. 1* therefore is inapposite.

Nor is our conclusion that the operation of the Pipeline Project will not result in a "discharge" in conflict with our holding in *National Wildlife Fed'n, supra.* In *National Wildlife*, we held that the Commission did not abuse its discretion in concluding that the discharge resulting from the construction and operation of a new dam "originate[d] by the dam" where the flow of water was blocked resulting in a water backup. 912 F.2d at 1484. This holding is distinguishable in two respects from the case at hand. First, the parties in *National Wildlife* did not dispute whether the construction and operation of the dam would create a discharge. The issue there was where that discharge would "originate." *See id.* at 1483-84. In addition, the *National Wildlife* case involved the creation of a discharge as a result of the construction and operation of a new dam. *Id.* at 1473. That case did not involve an alteration (much less a volume reduction) of a preexisting discharge.

Because we conclude that the withdrawal of water from Lake Gaston resulting in a decrease in the volume of a preexisting discharge is not an activity that "results in any discharge" for purposes of the Section 401 of the CWA, we must reject petitioners' claim that the Commission erred when it granted VEPCO's request for a license amendment without requiring that a water quality certification first be obtained from the state of North Carolina.

B. Arbitrary and Capricious Claims.

Petitioners also assert that the findings underlying the Commission's decision to grant the amendment to VEPCO's license were not supported by substantial evidence and that the decision itself was arbitrary and capricious. Under the FPA, we

review a Commission licensing decision to determine whether the factual findings underlying the decision were "supported by substantial evidence." 16 U.S.C. § 825*l*(b). We also review Commission licensing decisions to determine whether they were "arbitrary and capricious." *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 & n.3 (D.C.Cir.1996). In both cases, the review is quite deferential. So long as the Commission has examined the relevant data and provided a "reasoned explanation supported by a stated connection between the facts found and the choice made," we will defer to the agency's expertise. *United States Dep't of Interior v. FERC*, 952 F.2d 538, 543 (D.C.Cir.1992). Applying these principles of review, we consider each of petitioners' claims.

1. Need for 54 mgd of water.

Petitioners first challenge the Commission's conclusion that there is a "need" for the Pipeline Project. Section 10(a) of the FPA provides that the project for which a Commission license is issued must

> be such as in the judgment of the Commission will be best adapted to a comprehensive plan of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife . . ., and for other beneficial public uses, including irrigation, flood control, ***water supply***, and recreational and other purposes . . . .

16 U.S.C. § 803(a)(1) (emphasis added). The parties all agree that, under this provision, the Commission could only issue the license amendment authorizing the Pipeline Project if the Commission, in its judgment, determined that there is a need for 54 mgd of water in Virginia Beach. The only issue here is

whether the Commission's conclusion that there is such a need was supported by substantial evidence.

The Commission relied on the findings of its Final EIS in concluding that the five-city Virginia Beach region would need 54 mgd of water by the year 2030. *Rehearing Order*, 72 F.E.R.C. at 62,216. The Final EIS calculation of water need was derived from three figures: (1) projected water demand in the five-city region by the year 2030, (2) projected supply in that region by 2030, and (3) a drought margin. Final EIS at 1-6 to 1-22. The demand projection was a function of the five-city region's projected population and per capita water use in the year 2030. *Id.* at 1-9 to 1-13. Projected supply was based on the "safe yield" of available water sources in the five-city region. *Id.* at 1-16 to 1-20. The difference between the projected supply and the projected demand equaled the water supply deficit for the five-city region. *Id.* at 1-20. Then, in order to ensure "sound water supply planning," a drought margin was added to the water supply deficit to reach the 54 mgd of water need. *Id.* at 1-21. Petitioners challenge each step of this water need calculation. We consider these challenges in turn.

a. Population Projection.

Petitioners first contest the Commission's population projection for the year 2030. In formulating its population projection, the Commission had before it six different population projections, only four of which attempted to project the five-city region's population through the year 2030. The Commission elected not to use any of the 2030 projections. Instead, the Commission selected the population projection prepared by the Hampton Roads Planning District Commission ("HRPDC") which projected the population of the five-city region through the year 2015. That projection, according to the Commission, was "the most reasonable in that [it] considered local economic factors . . . and the recent decrease in the region's growth rate." Final EIS at 1-12. The Commission then extrapolated the HRPDC projection through 2030 using

the average annual growth rates underlying two of the four 2030 projections. The result was a population projection of 1,306,000 for the five-city region.

Petitioners argue that this projection was arbitrary and capricious in that extrapolation of the HRPDC estimate was based on growth rates from projections the Commission had "rejected as *too high.*" North Carolina's Brief at 32. We disagree. The Commission explained that the HRPDC estimate was chosen as "the most reasonable" because it considered "local economic factors." While the Commission's calculation of an extrapolation rate was based on the average growth rates from population projections rejected by the Commission as less "reasonable" than the HRPDC projection, the fact that these estimates were less "reasonable" does not necessarily make them unreasonable or arbitrary. Projections of any kind--especially those extending 40 years into the future--are necessarily speculative, inexact, and riddled with uncertainty. But at times, such as here, projections must be made. The mere fact that the Commission relied on necessarily imperfect information in calculating an extrapolation rate for the years 2015 to 2030 does not render the projection arbitrary. An agency need not "have perfect information before it takes any action." *United States Dep't of the Interior v. FERC*, 952 F.2d 538, 546 (D.C.Cir.1992). In the face of "serious uncertainties," an agency need only "explain the evidence which is available, and . . . offer a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 2871, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962)). The Commission has done so.

b. Per Capita Use Projection.

Petitioners also contest FERC's projected per capita water use figure of 118 gallons per capita per day ("gpcd") as arbitrarily inflated. First, RRBA contends that the Commission

reached its projected water use rate simply by taking the 1990 actual use rate for the five-city region of 121 gpcd and subtracting 3 gpcd to account for future improvements in water use efficiency. Reliance on a single year's data to develop a long-term projection is, according to RRBA, arbitrary and capricious.

RRBA's depiction of the process by which the Commission developed its water use projection is without basis in the record. The Commission clearly explained that its projected use figure was the product of a long-term "trend analysis." *Rehearing Order*, 72 F.E.R.C. at 62,217. In reaching its projection, the Commission began by noting that the use projections for Virginia Beach alone "cluster[ed] around 100 gpcd" with actual use in 1990 for the entire five-city region equaling 121 gpcd. Final EIS at 1-12. The Commission went on to explain that it expected these figures to rise as Virginia Beach and its surrounding areas became more urbanized. *Id.* at 1-12 to 1-13. However, the Commission also recognized that water conservation measures required by the Federal Energy Policy Act of 1992 were likely to result in a demand reduction of approximately 3.7 mgd. *Id.* at 1-13 to 1-15. Taking all of these factors into account, the Commission concluded that a projected per capita use rate of 118 gpcd was "reasonable for planning purposes." *Id.* at 1-15.

North Carolina asserts that the Commission's water use projection is arbitrary as demonstrated by Virginia Beach's concession that water use in the five-city region is declining. North Carolina too misstates the record. Virginia Beach did not concede that water use in the five-city region is declining, but only that it had "decline[d] slightly between 1990 and 1994." The Commission recognized and explained this decline as an expected year-to-year variation in demand.

North Carolina also asserts that Virginia Beach conceded that the water use data in the Commission's Final EIS was erroneous. Again, North Carolina misinterprets the record. What the city actually conceded was that one of the many

figures relied upon by the Commission in developing a 40-year water use projection contained some minor computational errors. North Carolina, however, has not demonstrated that the erroneous figure was integral to the Commission's water use projection or that revision of the figure would result in an altered projection. As a result, the error was harmless. *See Chemical Waste Mgmt., Inc. v. United States EPA*, 976 F.2d 2, 32 (D.C.Cir.1992), *cert. denied*, 507 U.S. 1057, 113 S.Ct. 1961, 123 L.Ed.2d 664 (1993).

North Carolina further argues that the Commission's water use projection of 118 gpcd is grossly excessive in light of the actual per capita water use in Virginia Beach during 1990 of 89 gpcd. This argument too is not persuasive. The Commission elected to project a water use rate for the entire five-city region, rather than for Virginia Beach alone "because of the existing interconnectedness of the system and the growing trend toward regional water sharing." *Rehearing Order*, 72 F.E.R.C. at 62,216. While the Commission's projected use figure for the five-city region exceeds the actual use figure for Virginia Beach, it is significantly less than the actual use rates of the more urbanized municipalities in the region such as Norfolk (166 gpcd) and Portsmouth (160 gpcd). Moreover, the Commission expected that per capita use rates in Virginia Beach and the other municipalities would likely increase as those areas became more urbanized. Final EIS at 1-12 to 1-13. These considerations led the Commission reasonably to conclude that a projected use rate of 118 gpcd was most appropriate.

Still further, petitioners together argue that the Commission's use rate projection is arbitrary in that it was developed without reference to more recent use rate data. According to petitioners, the Commission relied solely on 1990 use rate data in developing its projection despite the fact that more recent data indicated that use rates are declining. Petitioners contend that the Commission's failure to utilize this

more recent data was arbitrary and capricious. We must again disagree with petitioners.

As discussed above, the assertion that the Commission relied solely on 1990 use rate data in developing its use rate projection is without merit. Moreover, the Commission clearly explained its decision not to rely on the more recent water use data. According to the Commission, the more recent data was "somewhat misleading" in that it considered "finished water only" and was "not corrected to account for water from municipal wells of the portion of the population not served by public water." When the data was adjusted to account for these deficiencies, the Commission concluded that it showed only a small decline in per capita water use which was easily explained as an expected year-to-year variation in a long-term demand projection. *Rehearing Order*, 72 F.E.R.C. at 62,217. RRBA challenges the accuracy of this explanation on several grounds. However, the Commission refused to consider each of these arguments on the ground that they were not raised in a timely motion for reconsideration. *Id.* at 62,217 n.11. The review provisions of the FPA provide that a party "aggrieved by an order issued by the Commission . . . may apply for a rehearing within thirty days after the issuance of such order." 16 U.S.C. § 825*l*(a). An objection not raised before the Commission in a timely request for rehearing may not be considered by this court. *Id.* § 825*l*(b). There is no dispute that petitioners did not contest the Commission's explanation within the thirty-day time period. As a result, we are precluded from considering the issue on appeal.

c. Water Demand Projection.

Relying on its population and water use projections, the Commission derived a water demand figure for the five-city region for the year 2030. The Commission first adjusted its population projection of 1,306,000 to reflect the fact that only approximately 93.8 percent of the population will be served by public water in 2030. Multiplying this adjusted population figure by the projected per capita water use figure of 118 gpcd,

the Commission reached a projected water demand for the five-city region of 144.6 mgd. Final EIS at 1-15 to 1-16.

RRBA argues that the Commission erred in concluding that 93.8 percent of the five-city region's population would be served by public water in 2030. However, this claim was not raised in petitioners request for rehearing. We are therefore barred from considering the issue on appeal. 16 U.S.C. § 825*l*(b).

d. Water Supply Projection.

Petitioners next challenge as arbitrary the Commission's projected water supply "safe yield" of 112.8 mgd. "Safe yield" is defined as the quantity of raw water that could be withdrawn from a water source during the worst dry period of record since 1930 without depleting the source. Final EIS at 1-16 to 1-17. Petitioners first argue that FERC's calculation of water supply arbitrarily excluded 3 mgd of water available from aquifer storage and recovery ("ASR") systems. In its *Rehearing Order*, the Commission explained that the ASR system was not relevant to the calculation of water supply in that it "is not a new source of water." An ASR system "merely stores water from the existing supply for retrieval at a later date," and thus is not relevant to a calculation of long-term water supply. *Rehearing Order*, 72 F.E.R.C. at 62,217. The Commission further explains the relevance of its grounds for rejecting the ASR system data by noting that "an ASR system can accommodate only short term (seasonal) supply and demand; it does not resolve the significant long term regional water deficit described in the FEIS." *Id.* North Carolina's position that the ASR is relevant to the water available to a portion of the five-city area may be a reasonable one. However, FERC has considered and rejected that position in the language quoted above. It is not our role under an arbitrary and capricious review to reweigh the evidence, and we cannot say that the Commission's response to this comment was so unreasonable as to fail the deferential standard we must apply.

Petitioners make much of the fact that the Commission's draft EIS erroneously concluded that the Chesapeake ASR system had been abandoned due to cost. However, this error was not repeated in the Commission's *Rehearing Order*. *See* 72 F.E.R.C. at 4006. A final agency order is not rendered arbitrary and capricious simply because preliminary agency decisions contained errors. "Indeed, the very purpose of issuing tentative decisions is to afford the Commission an opportunity to correct any errors." *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 179 (D.C.Cir.1997).

Finally, petitioners assert that the Commission, without explanation, excluded from its calculation of water supply 2 mgd of water available through reservoir modifications. As we read the *Rehearing Order*, the Commission's discussion of ASR systems was also meant to apply to the reservoir modification issue. Neither ASR systems nor reservoirs are new sources of water; both simply store water from existing supplies for use at a later time. Thus, under the Commission's reasoning, neither was relevant to a calculation of longterm water supplies. We recognize that the Commission's discussion of this issue was far from a model of clarity. But petitioners' discussion of the issue in their request for rehearing was tucked away in a footnote in a paragraph primarily devoted to a discussion of ASR systems. Under these circumstances, the Commission "cannot be asked to make silk purse responses to sow's ear arguments." *City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C.Cir.1988).

e. Drought Margin.

Having projected water supply and demand for the five-city region, the Commission subtracted the former from the latter to reach a regional water supply deficit of 31.8 mgd. To this figure the Commission added a drought margin of 22.2 mgd to reach the projected water need of 54 mgd. Final EIS at 1-20 to 1-21. Petitioners raise several objections to this drought margin.

Petitioners first contend that a drought margin of any size is unnecessary given that the Commission's calculation of water supply was based on the "safe yield" which is defined as the quantity of raw water that could be withdrawn from a water source during the worst dry period of record since 1930 without depleting the source. We reject this argument. While the Commission's calculation of water supply was based on the quantity of water available during drought conditions, the calculation also assumed "complete interconnection and optimization of the five-city water systems . . ., the imposition of mandatory water use restrictions or rationing during droughts, and depletion of water storage during a drought of equal or greater severity than that on which the safe yield estimates are based." Final EIS at 1-20 to 1-21. But as the Commission explained, these assumptions are not consistent with "sound water supply planning" given that: (1) especially severe droughts might occur, (2) water sharing within the five-city region was not guaranteed, (3) water restrictions create public health and safety risks, and (4) future water demand might exceed projections. *Id.* at 1-21. It was to protect against these eventualities that an additional drought margin was included. We cannot say that such precautions are arbitrary or capricious.

In addition to objecting to the drought margin *per se*, North Carolina also objects to the Commission's calculation of the margin. North Carolina contends that it was arbitrary for the Commission to calculate the drought margin without taking into account the 50 mgd of water available from emergency wells during droughts. We disagree. The emergency wells in the five-city area are all owned by the jurisdictions surrounding Virginia Beach. While the wells are presently being leased back to Virginia Beach, these leases all expire by 1998 and the surrounding jurisdictions have indicated that they do not intend to renew the leases. *Rehearing Order*, 72 F.E.R.C. at 62,217. Therefore, it was entirely appropriate for FERC to exclude emergency well supplies when calculating the quantity of water that will be available for drought emergencies in the year 2030.

In a similar vein, North Carolina also argues that, in calculating the drought margin, the Commission arbitrarily failed to consider demand management techniques that could be employed during times of drought. This argument is without merit. The Commission clearly explained that it considered demand management techniques such as water rationing and use restrictions to be a threat to public safety and health. Final EIS at 1-21. For this reason, such measures were rejected as a solution to the five-city region's long-term water supply deficit.

Finally, RRBA argues that the Commission erred in simply adopting a Corps calculation of the necessary drought margin without independently verifying the Corps calculation. *See* 40 C.F.R. § 1506.5. The Commission contends that we should not reach this argument because it was not advanced before the Commission. In their rehearing motion, petitioners objected to the Commission's reliance on population and water use projections supplied "by the cities to be served by the project and the [HRPDC]." Rehearing Motion at 8. Petitioners did not object to the Commission's reliance on the Corps' drought margin calculation. We therefore agree with the Commission that petitioners waived this objection. 16 U.S.C. § 825*l*(b).

In sum, we hold that the Commission's calculation of water need for the five-city region was supported by substantial evidence and was neither arbitrary nor capricious.

2. Kerr Reservoir

Petitioners also maintain that the Commission failed to respond to significant comments concerning the availability of Kerr Reservoir water for purposes of mitigating the Pipeline Project's environmental effects on the Roanoke River. As mentioned above, the Commission prepared an EIS for the Pipeline Project analyzing the effects of the Project on the Roanoke River Basin. Final EIS at 3-1, 5-2. The EIS concluded that the Project withdrawals will "not have any significant adverse effects" on the Basin. *Id.* at 6-4. This

conclusion was premised on the Commission's belief that the water Virginia Beach had stored in Kerr Reservoir would be available for release to mitigate the Project's downstream effects. *Id.* at 4-31. Petitioners contend, however, that evidence before the Commission demonstrated that Virginia Beach was not legally entitled to order releases from Kerr Reservoir.

Petitioners' argument is without merit. The Commission concluded in its *License Amendment Order* that "Virginia Beach would be able to use its stored water to replace withdrawals on a gallon-for-gallon basis" to meet the striped bass target flows. 72 F.E.R.C. at 61,398. This conclusion appears consistent with the provisions of Virginia Beach's contract with the Corps for the storage of water in Kerr Reservoir which provides that Virginia Beach has the "right to order releases to be made" subject only to the government's rights to maintain downstream releases to meet established water requirements, to preserve life and/or property, and to maintain the project facilities. *See* Contract Between the United States of America and the City of Virginia Beach for Water Storage in Kerr Reservoir at 3. To the extent that evidence presented by petitioners contradicted the express language of this contract, it was rejected by the Commission.

3. Other Claims.

Petitioners claim that the Commission's decision was arbitrary and capricious in numerous other respects. Having considered each of these arguments carefully, we find them unworthy of separate discussion. Suffice it to say that we reject each of the additional claims.

III. Conclusion

For the foregoing reasons, we conclude that the Commission was not required to obtain a water quality certification from the state of North Carolina prior to granting the amendment to VEPCO's license for FERC Project No. 2009. We further conclude that the Commission's order

granting the license amendment was neither arbitrary nor capricious. We therefore deny the petition for review.

WALD, Circuit Judge, dissenting:

The majority holds (1) that the Federal Energy Regulatory Commission ("FERC") did not err in granting the Virginia Electric and Power Company ("VEPCO") an amendment to its license for the Lake Gaston power project authorizing the withdrawal of sixty million gallons per day of project water without requiring VEPCO to obtain a water quality certification from the State in which the power project's "discharge" originates, and (2) that FERC's decision to issue this license amendment was not arbitrary and capricious. I disagree with both of these propositions.

A. *North Carolina's Clean Water Act § 401(a)(1) Certification Rights*

The first paragraph of the Federal Water Pollution Control Act, popularly known as the Clean Water Act ("the Act"), declares that its goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The second subsection sets forth Congress' overarching policy in the Act, of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." *Id.* at § 1251(b). The Act charges each State with the duty of instituting comprehensive standards establishing quality goals for all intrastate waters. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313.

Section 401(a)(1) of the Act, 33 U.S.C. § 1341(a)(1), implements the policy of empowering States to protect their water quality programs by authorizing them to veto federal licenses or permits that threaten to undermine the quality of their waters. Specifically, § 401(a)(1) requires "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters" to provide the licensing or permitting agency with "a certification

from the State in which the discharge originates or will originate" that the discharge does not threaten the water quality standards that the State has implemented pursuant to other provisions of the Act. *Id.* I disagree with the majority's conclusion that North Carolina had no such certification right with regard to this license amendment, because I believe it ignores the language, structure, and purpose of the Act, and wrests away from North Carolina the very power to make water quality judgments about its own waterways that Congress expressly meant for that State alone to have.

The § 401 certification right is an essential component of the Act's state-oriented regulatory scheme. *See Keating v. FERC*, 927 F.2d 616, 622 (D.C.Cir.1991) ("The States remain, under the Clean Water Act, the prime bulwark in the effort to abate water pollution . . . Congress intended that the States would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.") (citation and internal quotation marks omitted). Obviously, how courts construe the Act's language specifying those situations in which States may wield this powerful weapon can critically affect their ability to protect the integrity of their waters in the way Congress intended. Too stingy an interpretation of § 401(a)(1) will severely burden each State's ability to implement the water quality program mandated by the Act, and will frustrate Congress' clear intent to institute a system under which States carry both the responsibility of setting their own water quality standards and a corresponding power to protect those standards from federally-licensed activities that threaten to undermine them. It is precisely because the § 401(a)(1) certification right is so vital to each State's ability to maintain its water quality that thirty-nine States signed an *amicus* brief strongly opposing FERC's assertion that North Carolina has no certification rights over this license amendment. *See* Brief of *Amici Curiae* States of Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas,

Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming.

The majority assumes *arguendo* that the flow of water through the power project's turbines in North Carolina is a § 401(a)(1) "discharge" implicating that State's certification rights, and this assumption is in fact required under the precedents set by the Supreme Court,[1] this court,[2] and FERC.[3] Furthermore, it appears that North Carolina will wield a § 401(a)(1) certification right in 2001, when the project's license will expire and VEPCO will request a new license. *See* Brief for Appellant Roanoke River Basin Association at 18-22. Yet the majority reaches the paradoxical conclusion that FERC may approve this license amendment, which all parties concede will alter the North Carolina "discharge," without requiring any certification from North Carolina. It is candidly difficult for me to get past this conundrum: Logically, if a State must consent before a new discharge is introduced into its waters, then a

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[1] *See PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711, 114 S.Ct. 1900, 1908, 128 L.Ed.2d 716 (1994) ("There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges--the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity.").

[2] *See National Wildlife Federation v. FERC*, 912 F.2d 1471, 1484 (D.C.Cir.1990) ("Common sense supports FERC's conclusion that the discharge in this case would occur at the dam, where the flow of water would be blocked and consequently the water would be backed up. . . .").

[3] *See City of Fort Smith*, 42 F.E.R.C. ¶ 61,362 at 62,047 (1988) ("In the case of the Lee Creek project, the discharge will occur over the dam and from the powerhouse tailrace . . . ."), *on reh'g*, 44 F.E.R.C. ¶ 61,160 at 61,513 (1988), *aff'd*, 912 F.2d 1471 (D.C.Cir.1990).

change in that discharge must require a new consent.[4] A question might, of course, be raised as to whether some license amendments are so clearly outside of the scope of § 401(a)(1) as to create no certification rights; license amendments that propose to alter a project in a way that will have no effect on an existing discharge, or that will have at most a ***de minimis*** effect on the discharge, may perhaps be granted without requiring a new certification from the State in which the discharge originates.[5] But the majority imposes a far more sweeping and arbitrary limitation on State certification rights, by declaring that no alteration of a discharge triggers a certification right

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[4] The majority questions the logic of this assertion by arguing that it would be irrational as applied to statutes that refer to "conduct resulting in injury" and "transactions resulting in financial loss." *See* majority opinion at 1186 n.2. But these analogies are clearly inapt. The more appropriate analogy would be to an argument that a statute referring explicitly to conduct that threatens to cause one *type* of injury or loss might be construed also to cover closely related types of injury or loss, rather than to an argument that a statute referring to conduct that causes some injury or loss should be construed also to cover conduct that causes the *reduction* of these ills. After all, the record before us involves a situation in which a *reduction* in a discharge may *increase* the very sort of "injury" to a State's water quality that the Act seeks to empower States to prevent. *See infra.*

[5] Additionally, there is in all cases the threshold requirement that a discharge covered by the license in question must "originate" within the State claiming a § 401(a)(1) certification right. The rights of "affected" States that cannot satisfy this threshold condition are defined in § 401(a)(2). *See* 33 U.S.C. § 1341(a)(2). Since there is no question that a discharge covered by the license that FERC amended originates in North Carolina, my interpretation would not by any means make § 401(a)(2) superfluous, *cf.* majority opinion at 1186 (summarizing FERC's arguments); if North Carolina were not the locus of a discharge covered by the license to be amended, its rights would be defined by § 401(a)(2), as are the rights of downstream "affected" States in regard to this license amendment.

unless it represents an "addition . . . of a substance or substances" to the discharge. Majority opinion at 1187.

I reject the majority's "substance-adding" threshold condition on the exercise of State certification rights. It badly distorts the definitions section of the Act, and improperly usurps crucial judgments on water quality that Congress reserved for the States into which the discharges flow. The initial flaw is the majority's characterization of the Act's definition of "discharge of a pollutant" as "the nearest evidence we have of definitional intent by Congress" as to when States have certification rights under § 401(a)(1). *Id.* The Act's legislative history says otherwise. The language creating certification rights in States in which a "discharge" may "originate" as a result of federally-licensed activities first appeared as part of the Water Quality Improvement Act of 1970, Pub.L. No. 91-224, 84 Stat. 91 (1970). The phrase "discharge of a pollutant," on which the majority leans so heavily, was nowhere to be found in that early version of the Act. It was only added with the passage, two years later, of the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816 (1972), which introduced it in conjunction with a set of provisions requiring permits for the "discharge of pollutants." 33 U.S.C. § 1342. Because the bare-bones term "discharge" was part of the Act before the 1972 amendments, and because it wasn't until two years later that Congress organized its new permit program around the separately coined and defined phrase "discharge of a pollutant," the notion that the latter phrase provides compelling evidence of the meaning of the former term is totally unpersuasive.

An even stranger facet of the majority's statutory analysis is its insistence that "near[er]" evidence of Congress' "definitional intent" as to what constitutes a discharge can be found by looking at the Act's definition of the phrase "discharge of a pollutant" than by relying on the Act's own definition of the very term under discussion--"discharge." The Act expressly states that the term "'discharge' when used

without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The only inference I can discern from this clear expression of nonexclusivity in the definition of "discharge" is that it was meant to encompass a wider array of interferences with the navigable waters than would qualify as "discharges of pollutants." *See National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 171-72 (D.C.Cir.1982) (distinguishing between statutory definitions that specify what a term "means" and those that offer a non-exclusive listing of what a term "includes").[6] How the majority manages to limit the scope of the unqualified term "discharge" to one subset that is "include[d]" in the broader term is beyond my ken.

Further evidence that Congress intended for States to have the power to protect their waters from interferences created by changes to a "discharge" that do not comprise the

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[6] I cannot fathom the majority's reasoning that, since the phrase "discharge of a pollutant" describes the addition of substances to the water, Congress meant for the term "discharge" also to refer only to the addition of substances to the water. *See* majority opinion at 1187 n.4. I find the majority's reasoning untenable--it seems far more reasonable that, by retaining the term "discharge" unmodified by the words "of a pollutant," Congress must have intended that the term would have a broader meaning when used *without* these restrictive modifying words than it does when used *with* these restrictive modifying words. And this broader meaning should encompass the subtraction of part of an existing discharge because, as I explain *infra*, the subtraction of water from a discharge may be just as harmful to a waterway as the addition of substances to the water. Under the majority's reasoning, even the initial construction of this power project--which created a new discharge in North Carolina--would not have triggered any certification rights in North Carolina if § 401(a)(1) had then been in effect, provided that the project did not add any substance to the water that passed through the dam turbines. Such a result, of course, would be at odds with the majority's assumption *arguendo* that the flow of water through a power project's turbines is a discharge. *See* majority opinion at 1187.

"addition" of any "substance or substances" is observable in the Act's treatment of the term "pollution." Section 304 of the Act "expressly recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters. . . .'" *PUD No. 1*, 511 U.S. at 719-20, 114 S.Ct. at 1913 (quoting 33 U.S.C. § 1314(f)). The Environmental Protection Agency's regulations implementing the Act likewise express a concern with interferences that have "flowage effects." *Id.* I had thought it beyond dispute that even alterations of existing discharges that do not "add" any "substance or substances" to the water may yet affect the water's "movement, flow, or circulation," that this effect may constitute "pollution," and that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphasis added).[7] Yet the majority is comfortable

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[7] Employing the currently popular "dictionary jurisprudence," the majority reasons that the "activity" here--the diversion of water to Virginia Beach--will not "result in" a discharge, as required by § 401(a)(1), *see* majority opinion at 1188, because the activity authorized by the license amendment gives rise only to an "altered" discharge, rather than a brand new one. I fail to see how this dictionary exercise provides any compelling reason to ignore the implications of the Act's State-enforcement policy and central concern with preventing and eliminating "pollution." To the contrary, it would block a State's certification rights even in the case of a license amendment authorizing the "addition" of a "substance or substances" to an existing discharge, since the "addition" of substances merely "alters" a discharge, and does not cause the discharge to "arise as a consequence" of the addition. *Id.* I find the majority's use of the dictionary to support its assertion that there is no hint of ambiguity in § 401(a)(1), *see id.* at 1183 n.1, unacceptable; to my mind, there is certainly enough ambiguity to justify consideration of the purpose and structure of the Act in determining the scope of States' certification rights. After all, the Act defines the term "discharge" in a purposely open-ended fashion, *see* 33 U.S.C. § 1362(16), and § 401(a)(1) doesn't even require concrete certainty that a discharge will "result" from the activity to be

in wrenching away from a State this very power to protect its water quality from the "pollution" threatened by the alteration of an existing discharge.

The majority's niggardly construction of the term "discharge" threatens a congressional policy permeating the general structure of the Act, a policy specifically declared in the Act's second subsection: States were to be put in charge of making and enforcing the crucial judgments surrounding water quality within their borders. *See* 33 U.S.C. § 1251(b). When a federally-licensed activity would "result in" a "discharge" into the State's waters, the decision whether that interference with the State's waters would be tolerated was to belong solely to the State in which that discharge originated, not to a federal agency or to a federal court. Given the relative competency of State water quality agencies and federal courts, this policy seems quite sound. The waterways that we judges see only as lines on a diagram are in reality extraordinarily complex and sensitive systems in which water, oxygen, dissolved minerals, sediment, and other materials intermingle and interact. Interferences with the integrity of a waterway need not take the archetypal form of sludge spewing from an outfall; other changes can be just as deadly to fish and other wildlife as are toxic chemicals. For example, alterations that cause the temperature of the water in a discharge to rise, or that rearrange the spatial distribution of oxygen, sediment, or minerals in the downstream water, could be catastrophic from the perspective of water quality, *see*

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licensed--it requires State certification for any activity that "*may* result in" a discharge. 33 U.S.C. § 1341(a)(1) (emphasis added). Imposing dictionary-derived limitations on the Act is particularly dangerous in this context and invites egregious abuses--for example, a licensee could obtain a State's certification of a minor, non-threatening discharge and then transform the discharge into a pollution-causing nightmare, evading the State's power to prevent the change by characterizing it as merely as merely an "alteration" of an existing discharge.

Gorsuch, 693 F.2d at 163-64.[8] Yet the effect of this court's decision will be to bar States in which altered discharges originate from acting to protect their waters from such pernicious effects, whenever the alteration does not "add" any "substance or substances" to the water. I do not believe Congress intended to give this court's essentially *ad hoc* and inevitably inexpert judgments precedence over the expert judgments of the States' water quality authorities, in the making of such crucial determinations.

The majority itself recognizes, in expressing "serious reservations" about FERC's ability to limit by regulation States' certification rights to license amendments that might have a "material adverse impact" on the water quality in a discharge, that judgments intrinsically related to water quality in the context of the alteration of existing discharges are the sole province of the States in which the discharges originate. *See* majority opinion at 1186 (quoting 18 C.F.R. § 4.38(f)(7)(iii) (1995)). By empowering itself to make a threshold determination regarding whether an alteration in a discharge threatens a "material adverse impact" on the State's water quality, FERC is taking from the State a power that Congress intended for the State alone to have. Section 401(a)(1) enables States to raise an absolute bar to federal licenses that threaten their waters; Congress completely stripped federal agencies of the power to issue covered licenses without the State's certification. Indeed, FERC is assigning itself a function which makes no sense in light of the structure of the Act, which puts each State in charge of authoritatively defining the term "water quality" within its borders--why, in this one context, should a federal agency be able to stand in a State's shoes and make the State's "water quality" determinations for it? Thus, I share the

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[8] In *Gorsuch*, this court observed that the term "pollutant" might reasonably include such "Dam-Induced Water Quality Changes" as low dissolved oxygen, dissolved minerals, heat, sediment, and oxygen "supersaturation," *id.* at 161, 166, though we deferred to the EPA's interpretation of the term "pollutant," in a different section of the Act, as not including these effects. *See id.* at 183.

majority's concerns about FERC's regulation, but I can't help but wonder why the majority doesn't feel the same discomfort about its own arrogation of a similar power to preempt a State's water quality determinations. Congress did not intend for this court to usurp North Carolina's power to manage its water quality program any more than it intended to give FERC such a role, and surely we are as ignorant as FERC on the subject of what "water quality" is optimal for the citizens of North Carolina.

The Supreme Court and our own court have previously exercised appropriate reluctance to read the Clean Water Act in the arbitrary and artificial fashion proffered today. When a city and a utility district urged the Supreme Court in *PUD No. 1* to adopt a formalistic approach very much like the majority's, the Court categorically refused. The *PUD No. 1* petitioners asserted that the Clean Water Act is concerned only with water "quality," and does not regulate water "quantity." *See PUD No. 1*, 511 U.S. at 717-19, 114 S.Ct. at 1912. The Supreme Court rejected this "artificial distinction," *id.*, noting that water quantity is closely related to water quality, and that both the definitions section and § 304 of the Act set forth a "broad conception of pollution" which "expressly evinces Congress' concern with the physical and biological integrity of water." *Id.* at 719, 114 S.Ct. at 1913. And in *National Wildlife Federation* this court likewise recognized that the Clean Water Act is not to be constrained by artificial limitations such as the majority's "substance-adding" standard. In that case, we found that the "backing up" of water by a dam constituted a § 401(a)(1) "discharge," *see National Wildlife Federation*, 912 F.2d at 1483-84; in so doing, we apparently recognized that an interference with a river that results in the alteration of the "movement, flow, or circulation" of water (and thus causes "pollution") is cause for the recognition of a certification right in the State where this discharge originates.[9] Since the "backing

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[9] In that case, we declined to recognize a certification right in the upstream State, however, because we found that the discharge "originate[d]" at the

up" of water does not satisfy the majority's "substance-adding" standard, it is clear that today's holding is in tension with our own precedent.[10]

Instead of crafting an arbitrary and exceedingly formalistic new standard governing the scope of State certification rights under § 401(a)(1), we should be traversing the main channel charted by the Act, the Supreme Court, and our own precedent. These authorities require us to find that the license amendment at issue in this case is one that triggers a certification right in North Carolina, the State in which the project's discharge originates. Thus I would suspend consideration of the other challenges to these orders, and require FERC to await a § 401(a)(1) certification from North Carolina before considering whether to grant the amendment.

A. *FERC's Finding of a Need to Withdraw Sixty Million Gallons of Water per Day*

Even if North Carolina's failure to certify the license amendment were not contrary to the Act, however, I would vacate the challenged orders and remand this matter to FERC on the ground that FERC's estimate of the "need" for the

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dam, which was located downstream in another state. *See id.* at 1484.

[10] The majority disclaims tension between this case and *National Wildlife Federation* on the grounds that the parties in that case did not dispute the question of whether the construction and operation of the dam would create a discharge, and that the discharge at issue related to a new dam, rather than to the altered operations of an existing dam. *See* majority opinion at 1188. But the *National Wildlife* opinion refers to the expulsion of water through the dam's turbines as a § 401 "discharge," and describes the "discharge" as follows: "[T]he discharge in this case would occur at the dam, ***where the flow of water would be blocked and consequently the water would be backed up*** . . . ." *National Wildlife Federation*, 912 F.2d at 1484 (emphasis added). The fact that the "backing up" of water resulted from the construction of a new dam, rather than from the alteration of an existing dam, played no part in the *National Wildlife Federation* court's analysis.

fifty-four million gallons per day to be supplied by the pipeline project was arbitrary and capricious.

FERC had already reached the conclusion that Virginia Beach needed to withdraw sixty million gallons of the Roanoke River per day by October of 1994, when it declared that "[n]o new analysis" of this estimate was necessary. Scoping Document 2, FERC No.2009-003; Deferred Appendix "D.A." at 2547, 2551. It is hardly surprising, therefore, that FERC's July, 1995 Final Environmental Impact Statement arrived at this precise estimate of Virginia Beach's "need." Nor is it surprising that FERC's attempt to disguise the fact that it was "backing into" this number fails rather badly.

I agree with my colleagues that the first few steps in FERC's analysis were tolerably reasonable. FERC organized its analysis into separate projections of the demand for water in the year 2030 and of regional supply in that year. The basic structure of the inquiry was sound, as was the projection of the region's 2030 demand for water. But when FERC turned to the supply side of the equation, its logic became curiouser and curiouser. On the apparent assumption that the water supply from existing sources would remain constant through 2030, FERC's projection of 2030 supply was based on the water available from existing sources. Specifically, FERC's supply estimate was based on the amount the residents of the region could withdraw from the existing water sources during the worst drought of record since 1930; this drought occurred in 1930, and the U.S. Geological Survey estimates that such droughts may recur at intervals of between thirty and eighty or more years. The estimated "Water Supply Deficit" for 2030, based on this drought-adjusted supply, came out to 31.8 million gallons per day.

Common sense would seem to indicate that the obvious way to prepare for short-term periods of special water need is to create water storage systems that can be filled during nondrought periods, exhausted to meet these short-term needs when they arise, and refilled when the droughts recede. But

FERC rejected all of the storage options pressed by participants in the proceedings below, arguing that storage techniques were irrelevant to its "need" calculation because storage systems do not constitute "sources" of water, and because they serve only short-term need. *See* majority opinion at 1192. Of course, the fact that storage systems aren't new "sources" of water in the sense of meeting long-term, continuous demand hardly justifies FERC's refusal to consider the availability of these systems, because they just as clearly are precisely suited to serve short-term periods of special demand that occur at intervals more than long enough to permit the storage systems to be replenished, and thus could be used to obviate any increment in the quantity of water to be ***constantly*** supplied to the region to protect it from droughts of extraordinary severity.

A similar illogic permeates FERC's attempt to explain its refusal to take account of the water available from the region's wells. FERC specifically refused to factor in the water available from two Norfolk wells on the ground that these wells were meant to be used only during droughts that threaten military readiness, and FERC likewise thought it unnecessary to consider the water available from unspecified "emergency wells" in the region on the ground that their use was restricted to municipally-declared emergencies.[11] The Corps, FERC noted, "considers these wells as protection against extreme droughts." D.A. at 3166. I can only speculate as to what the terms "municipal emergency" and "extreme drought" are meant to cover, if not droughts more severe than the worst since 1930. FERC's reasoning falls far short of providing any rational or even vaguely comprehensible explanation for its refusal to

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[11] The majority asserts that FERC's refusal to consider the water in these wells in its estimate of the regional supply was appropriate because these wells may not be available for use by Virginia Beach after next year. *See* majority opinion at 1193. But this portion of FERC's analysis was based on the supply of water available to the ***region***, rather than to Virginia Beach alone, and therefore it is irrelevant that this emergency supply may become unavailable to one of the cities in the region.

integrate into its need calculation the water available from "emergency" wells and water storage systems--the most intuitively obvious strategies for dealing with infrequent, short-term, emergency water needs.

Having rejected the commonplace strategies that would enable the region to weather droughts, but would not enable FERC to claim that a pipeline continuously withdrawing sixty million gallons of water per day was needed, FERC's next step was to ratchet its "need" estimate up to that amount. For this final adjustment, FERC set out five reasons for its conclusion that a second "drought adjustment" was necessary, explaining that merely covering the 31.8 million gallon per day "deficit" was insufficient because:

- it provides no protection against droughts of greater severity than those that occurred in the past;
- there is no guarantee that water sharing would occur among the cities;
- severe water use restrictions would continue to place local users at a public health and safety risk;
- future water demands may exceed projections; and
- loss of a water supply in this large metropolitan area would be catastrophic.

D.A. at 3167, *see also* majority opinion at 1193. For these "reasons," FERC concluded that it was necessary to jack up the "need" estimate to include another thirteen to sixty-eight million gallons per day of continuous supply. But these "reasons" simply amount to FERC's generalized worry that its entire analysis leading up the 31.8 million gallon per day "deficit" might be flawed in such a way as to make its need

estimate too low. If water were an unlimited, free resource, it might seem appropriate to double the estimate of water "need" in case actual need were to exceed all expectations, but if water were an unlimited, free resource, nothing much would turn on whether FERC's "need" estimate satisfied any baseline standard of rationality. FERC itself recognizes that the amount of water to be removed from the river must correspond to a rational calculation of actual "need," and thus makes a show of reaching this estimate by using the available data and reasonable assumptions; it cannot at the end of the game simply knock the pieces off the chessboard in the name of unforeseen contingencies and unprecedented emergencies, and still claim that it did not act arbitrarily or capriciously because it played by the rules *almost* to the end.

Because, finally, I believe that the license amendment FERC approved by its challenged order may not be granted consistently with § 401(a)(1) of the Clean Water Act unless and until North Carolina has certified that the activity to be conducted pursuant to the amendment does not threaten that State's water quality standards, I would vacate FERC's order and rehearing order, and remand the matter to FERC with the instruction that it withhold the amendment pending North Carolina's certification. Even if I did not believe that FERC's failure to require VEPCO to obtain North Carolina's certification was illegal, I would still vacate these orders on the ground that they were arbitrary and capricious, and would remand the matter to FERC for an estimate of Virginia Beach's "need" for water that gives due consideration to storage options and "emergency" sources. On both of these grounds, I respectfully dissent from the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1494 **September Term, 1996**

State of North Carolina, [Filed May 9, 1997]

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

The City of Virginia Beach, Virginia,

Intervenor

Consolidated with 95-1500

On Petitions for Review of an Order of the
Federal Energy Regulatory Commission

Before: WALD, SILBERMAN and SENTELLE, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Federal Energy Regulatory Commission and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petitions for review are denied, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: May 9, 1997

Opinion for the Court filed by Circuit Judge Sentelle.
Dissenting opinion filed by Circuit Judge Wald.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1494 **September Term 1996**

State of North Carolina, et al. [Filed Sept. 11, 1996]

v.

Federal Energy Regulatory Commission

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and consolidated case No. 95-1500

Before: WALD, SILBERMAN, and SENTELLE, *Circuit Judges*

REMAND OF THE RECORD

On September 9, 1996, this Court heard oral argument in *State of North Carolina, et al. v. Federal Energy Regulatory Commission.* It appears from the record, briefs, and oral argument that the Federal Energy Regulatory Commission ("Commission"), in the proceedings below, declined to decide a question that is of central importance to this case, and is logically antecedent to many of the other material issues presented in the case. The Court, therefore, on its own motion, remands the record to the Commission with instructions that the Commission supplement the record with its decision of the question identified below within 60 days of issuance of this order.

Petitioners have asked this Court to hold that the Commission violated § 401(a)(1) of the Clean Water Act by its

"Order Approving Non-Project Use of Project Lands and Waters and Amending License" "(FERC Order") for Project No. 2009-003, a hydropower project straddling the Virginia-North Carolina border. *See Virginia Electric and Power Company*, "Order Approving Non-Project Use of Project Lands and Waters and Amending License," 72 F.E.R.C. par. 61,075 (July 26, 1995). The Order amended the project license to permit the city of Virginia Beach to construct and operate a water intake facility within the project boundary on the Virginia side, which would withdraw project waters for transport via a pipeline to Virginia Beach. The withdrawal of project waters in Virginia would in turn reduce the amount of water flowing through the project dams in North Carolina.

Section 401(a)(l) of the Clean Water Act provides, in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been

> obtained or has been waived as provided in the preceding sentence.

Petitioners allege here, as they did before the Commission, that, by granting a license amendment authorizing the withdrawal of project waters on the Virginia side, the Commission violated § 401(a)(1) because the proposed withdrawal of project waters is an "activity . . . which may result in [a] discharge into the navigable waters" which discharge would "originate" in North Carolina, and because North Carolina has neither certified that this discharge would comply with the applicable sections of the Clean Water Act, nor waived certification.

In its order, the Commission responded to petitioners' claim, but expressly declined to decide the question of whether § 401(a)(1) applies to this license amendment to require a certification from North Carolina. Rather, the Commission quoted from § 401, then said the following:

> However, even assuming, ***arguendo,*** that the proposed amendment to the Project No. 2009 license to accommodate the construction and operation of Virginia Beach's water supply project is subject to the provisions of section 401(a)(1), the amendment does not trigger the requirement for certification under that section. Section 4.38(f)(7)(iii) of the Commission's regulations provides in pertinent part:
>
> > [A]ny application to amend an existing license . . . requires a new request for water quality certification . . . if the amendment would have a material adverse impact on the water quality in the discharge from the project . . . .

> The impact of an approximately one percent reduction in flow releases into the Roanoke River from the project dam is exhaustively analyzed in the FEIS, as summarized above and discussed below. We conclude, based on that analysis, that the amendment to the license will not have a material adverse impact on the water quality in the discharge from the project. Accordingly, the license can be amended without water quality certification (or waiver thereof) from North Carolina.

FERC Order, 72 F.E.R.C. at 61,393-94.

This language leaves unresolved the question of whether § 401(a)(1) applies to require a certification from North Carolina, insofar as the Commission "assum[ed], *arguendo*" that the answer was "yes" and proceeded to rest its action on Section 4.38(f)(7)(iii) of its regulations. Following initial briefing and oral argument, the Court believes that in the interest of judicial economy the Commission should answer this question before we exercise judicial review over the other issues of the case.

This Court will retain jurisdiction over this case until the Commission has supplemented and returned the record with its answer to the question posed above, at which time additional briefing or argument may be scheduled.

Per Curiam

For the Court:

Mark J. Langer, Clerk

By: s/Cheri Carter

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1494 **September Term, 1996**

State of North Carolina, [Filed Sept. 19, 1996]

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

The City of Virginia Beach, Virginia,

Intervenor

Consolidated with 95-1500

BEFORE: Wald, Silberman and Sentelle, Circuit Judges

ORDER

Upon consideration of the motion to modify remand of the record, it is

ORDERED, on the court's own motion, that the court's order filed September 11, 1996, remanding the record be amended as follows:

Page 2, paragraph 1, line 3

Delete the words:

"proposed withdrawal of project waters"

and insert in lieu thereof:

"alteration of the Project and its operations resulting from the withdrawal of project waters"

Per Curiam

For the Court:
Mark J. Langer, Clerk

By: s/Linda Jones
Linda Jones
Deputy Clerk

Virginia Electric and Power Company, Project No. 2009-003

Order Approving Non-project Use of Project Lands and Waters and Amending License

(Issued July 26, 1995)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

Virginia Electric and Power Company (Virginia Power) operates the Gaston and Roanoke Rapids Project No. 2009 pursuant to a license issued by the Commission under Part I of the Federal Power Act (FPA).[1] The project is located on the Roanoke River in Virginia and North Carolina.

On February 20, 1991, Virginia Power filed, on behalf of the City of Virginia Beach, Virginia, an application for Commission approval of Virginia Beach's proposal to withdraw certain water from the project reservoir, Lake Gaston, and to construct and operate a water intake facility within the project boundary for that purpose. The water would be supplied to Virginia Beach for consumption.

The Commission published notice of the application. The State of North Carolina, the Town of Weldon, North Carolina, Virginia Beach, the Roanoke Rapids Sanitary District, the Roanoke River Basin Association, the Sierra Club, the North Carolina Wildlife Federation, and the R. C. Wildlife Club Inc. filed timely motions to intervene and automatically became parties to the proceeding by operation of the Commission's Rules of Practice and Procedure. The National Marine Fisheries Service (NMFS) and the North Carolina Farm Bureau Federation motions to intervene out of time were granted by the Secretary on June 20, 1991. These and many other interested persons filed written comments.

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[1] 15 U.S.C. § § 792-823(b).

We have carefully considered all of these expressions of view, and all of the evidence in the voluminous record before us. For the reasons discussed below, we will approve Virginia Beach's proposed withdrawal of water from the Project No. 2009 reservoir and will also amend Virginia Power's license as needed in light of that approval. In reaching this decision, however, we are very cognizant of the concerns expressed by the other parties in the proceeding. We fully recognize the importance of protecting the interests of persons living downstream from the project in North Carolina, as well as those who live in the vicinity of Lake Gaston. Those interests have been very forcefully and eloquently brought to our attention by the State of North Carolina and a multitude of both public officials and private citizens. We believe that the conditions attached to our authorizations will fully protect those who are so vitally concerned about the water diversion.

I. Background

The Commission issued a license to construct and operate the Roanoke Rapids Project in 1951.[2] The license was amended in 1960 to authorize construction and operation of the Gaston development.[3] The license is for a 50-year term, expiring on January 31, 2001.[4] The total capacity of the project is 277.9 MW, consisting of 100 MW for the Roanoke Rapids development and 177.9 MW for the Lake Gaston development.

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[2] The license was issued by the Commission's predecessor, the Federal Power Commission. *See* 10 FPC 1 (1951). The license include standard articles (L-Form, Articles 1 through 6 and 8 through 18) that are printed at 23 FPC 537,544 (1960).

[3] 23 FPC 537. For other amendments to the license, *see* 16 FPC 862 (1956), 17 FPC 716 (1957), 24 FPC 352 (1960), 31 FPC 1141 (1964) and 52 FPC 1067 (1974).

[4] On March 27, 1995, Virginia Power filed with the Commission a copy of its First State Consultation Package, in which it stated that it plans to file an application for a new license for the project on or before January 31, 1999.

Virginia Beach's Lake Gaston water supply project will divert approximately one percent of the average annual flow of the Roanoke River for consumptive use in Virginia Beach. The water will be transported to Virginia Beach in a 76-mile-long pipeline. Virginia Beach will compensate Virginia Power for the value of the lost electric generation attributable to the water withdrawn.

The project dams are located in North Carolina. The project reservoir is located in both North Carolina and Virginia. The facilities for supplying water to Virginia Beach will be located in Virginia.

Under the proposal, Virginia Beach will be permitted to use project land and water to withdraw up to 60 million gallons per day (mgd) of water for municipal water supply purposes. The water from Lake Gaston will supply four Virginia municipalities: the City of Virginia Beach (48 mgd), the City of Chesapeake (10 mgd), Isle of Wight County (1 mgd), and the Town of Franklin (1 mgd). The 60 mgd withdrawal will increase the treated water safe yield by only 54 mgd, because of transmission losses associated with delivery, storage, and treatment of Lake Gaston water.

The parts of the water supply project that will be within the Project No. 2009 boundary are: two wedge-wire screen intake assemblies approximately 200 feet from the eastern shoreline of Pea Hill Cove in Lake Gaston, at an elevation of 185 feet,[5] with slot openings of 1.0 millimeter and a maximum velocity through the slot of 0.5 feet per second (each intake will connect to a pumping station that will have a design capacity of 60 mgd); a mitigation facility to enhance walleye spawning in Pea Hill Cove, consisting of submerged riprap covering 1/3 acre of lake bottom approximately 600 feet from the intake structure; a boat ramp, pier, boathouse, and appurtenant facilities along the Pea Hill Cove shore, to enable inspection and maintenance of Virginia Beach's in-water facilities and for collection of water quality samples; and approximately 250 feet

[5] All elevations are in feet above mean sea level.

of underground 60-inch-diameter concrete pipe and associated facilities crossing a minor tributary 4o Pea Hill Cove, about 4,000 feet east of the pump station on project lands.

In addition to the facilities within the Project No. 2009 boundary, the water supply project will include a 76-mile-long 60-inch-diameter pipeline, largely underground, which will convey water from Lake Gaston to the Ennis Pond Channel of Lake Prince in Suffolk, Virginia, crossing five counties. Lake Prince is the current location of a raw water intake and distribution facility operated by the City of Norfolk.

The pipeline will require a permanent right-of-way at least 30 feet wide. Approximately 90 percent of the pipeline will follow existing railroad (abandoned), water, and electric transmission line rights-of-way. The top of the pipeline will be a minimum of 36 inches below finished grade to protect against frost action. The pipeline will include an open air cascading-step aeration structure near Windsor, Virginia, which will aerate pipeline water to achieve appropriate dissolved oxygen (DO) concentrations before the water discharges to Lake Prince.

In addition to the walleye spawning facility described above, Virginia Beach has agreed to undertake measures to mitigate environmental impacts arising from construction and operation of the entire water supply project. Virginia Beach has purchased rights to approximately 10,200 acre-feet of storage in Kerr Reservoir (a storage reservoir operated by the U.S. Army Corps of Engineers and located upstream from Lake Gaston) to supplement water flows during periods of drought and to mitigate project impacts on striped bass during spawning periods. Also, pursuant to the dredge and fill permit issued by the Corps of Engineers (discussed below), Virginia Beach will create 11.67 acres of wetlands to mitigate any disturbance or destruction of wetlands associated with pipeline construction.

Virginia Beach's proposal has undergone rigorous environmental scrutiny and analysis, both by our Commission and by other federal agencies in related proceedings. On July

23, 1993, the Commission's staff issued a draft Environmental Assessment (DEA). On June 23, 1994, the staff issued a final Environmental Assessment (FEA), which recommended preparation of an Environmental Impact Statement (EIS). On August 11, 1994, the Commission issued an order confirming preparation of an EIS.[6]

On-site scoping meetings for the EIS were held in July 1994.[7] The draft EIS (DEIS) was issued on January 27, 1995, and the final EIS (FEIS) was issued on July 7, 1995. The FEIS and its conclusions are summarized in the next section of this order.

In a related proceeding, on May 19, 1994, the Secretary of Commerce issued his Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company from an Objection by the North Carolina Department of Environment, Health and Natural Resources. The Secretary determined, among other things, that the Virginia Beach water supply project is consistent with the objectives and purposes of the Coastal Zone Management Act (CZMA).[8] In reaching this conclusion, the Secretary determined that: (1) the project will foster development of the coastal zone and coastal zone resources, thus furthering

[6] 68 FERC ¶ 61,227. Pursuant to the Commission's long established practice (*see, e.g., Pennsylvania Electric Co.*, 44 FERC ¶ 61,298 (1988)), Virginia Power filed an application for approval of a non-project use of project lands and waters. However, as we have noted (*id.* at p. 62,075 n.1), because Virginia Beach's proposal entails a substantial new use of project waters, in this case authorization of the non-project use also requires amendment of the license.

[7] On December 22, 1994, the U.S. Court of Appeals for the Fourth Circuit issued an opinion denying a petition filed by Virginia Beach for a writ of mandamus, seeking in effect to omit the preparation of an EIS. 42 F.3d 881.

[8] Pursuant to section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), a finding of inconsistency would have precluded the Commission from allowing Project No. 2009 lands and waters to be used for the water supply project.

objectives and purposes of the CZMA; (2) the project's individual and cumulative adverse effects on the Coastal Zone are outweighed by its contribution to the national interest; (3) the project will not violate the Clean Water Act or the Clean Air Act; and (4) there are no reasonable alternatives available which would permit the project to be conducted in a manner consistent with the State of North Carolina's coastal management program.

North Carolina filed a petition for review of the Secretary's CZMA decision in the U.S. District Court for the District of Columbia. The court appointed a mediator to facilitate a settlement between North Carolina and Virginia Beach. As discussed below, those efforts resulted in a settlement between those two parties but the settlement did not become effective. The CZMA litigation is currently pending before that court.

In another related proceeding, the Corps of Engineers issued a dredge and fill permit to Virginia Beach, under section 10 of the Rivers and Harbors Act of 1899[9] and section 404 of the Clean Water Act,[10] to construct the proposed water intake at Lake Gaston and the proposed water pipeline to the vicinity of Virginia Beach.[11] The sufficiency of the Corps' environmental

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[9] 33 U.S.C. § 403.

[10] 33 U.S.C. § 1344.

[11] The Corps may issue a permit under section 404 of the CWA only if the activity to be permitted has received water quality certification (or waiver thereof) under section 401(a)(1) of the CWA, 33 U.S.C. § 1341. The Corps' permit, issued on January 9, 1984, was predicated on a water quality certification issued by the Virginia Water Control Board to Virginia Beach on September 12, 1983. Virginia Beach made minor modifications to its proposal in 1988, which were approved by the Corps on December 17, 1992 (see section 2.4.1 of the FEIS). The water quality certification is subject to 12 conditions (see the FEIS at pages 2-37).

analysis associated with the issuance of that permit was approved on court review.[12]

On April 28, 1995, the Commission's staff sent a letter to the State Historic Preservation Officer (SHPO) in the Virginia Department of Historic Resources, concluding that there are no historic properties within the area of potential effect, which was defined to be the lands within the project boundary that would be affected by the proposed construction.[13] On May 1, 1995, the Virginia Department responded with a letter concurring in the determination that the proposed activity will have no effect on historic properties, and stating that the requirements of section 106 of the National Historic Preservation Act of 1966, as amended, have been met.[14]

On April 26, 1995, the Commission issued notice of a public conference to afford the parties an opportunity to bring to the Commission's attention any information that they believed to be pertinent to the procedural schedule for the issuance of the FEIS and the order on the application. The notice referred to indications that settlement discussions were in progress. On May 1, 1995, counsel for North Carolina filed a copy of a settlement between the State of North Carolina and the City of Virginia Beach. On May 3, 1995, the Commission held a public conference to discuss future schedules and procedures, at which time counsel for the applicant and the

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[12] *See North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987); *North Carolina v. Hudson*, 731 F. Supp. 1261 (E.D.N.C. 1990); *Roanoke River Basin Association v. Hudson*, 940 F.2d 58 (4th Cir. 1991); and *North Carolina v. Virginia Beach*, 951 F.2d 596 (4th Cir. 1991).

[13] Letter from J. Mark Robinson, Director, Division of Project Compliance and Administration, to Alexander Wise, Jr., State Historic Preservation Officer, Department of Historic Resources, Richmond, Virginia.

[14] Letter from David H. Burton, Director, Division of Project Review, Department of Historic Resources, to J. Mark Robinson.

principal parties in the proceeding discussed their understanding of the settlement.[15]

On May 12, 1995, Virginia Power filed an amendment to its application, to which was attached a copy of the settlement. On May 16, 1995, the Commission issued a notice of the amendment, inviting all interested persons to file comments and reply comments.

On June 28, 1995, Virginia Beach filed with the Commission an amended settlement agreement between itself and North Carolina. By separate letters dated July 6, 1995, North Carolina and Virginia Beach notified the Commission that the settlement (with or without the amendment thereto) did not take effect because the conditions precedent to the settlement did not occur, and therefore there was no agreement between those two parties. On July 7, the Commission issued the FEIS.[16] Thereafter, several parties filed procedural motions and responses that are discussed below.

Virginia Power's amendment to the application states that it is to be deemed withdrawn in the event of notice to the Commission that the settlement "failed to become effective in accordance with its terms."[17] Such notice having been filed

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[15] The participants in the conference included the mediator, counsel for Virginia Power, North Carolina, Virginia Beach, Weldon, and the Roanoke River Basin Association, Congressman L. H. Payne of Virginia, and a Congressional staff person speaking on behalf of Senators John Warner and Charles Robb of Virginia.

[16] The Commission delayed issuing the FEIS prior to that date at the joint request of North Carolina and Virginia Beach, who stated that premature issuance of the FEIS might disrupt the sequence of conditions precedent to their settlement's becoming effective. *See* the joint letter of June 29, 1995, from counsel for North Carolina and Virginia Beach to the Commission's Secretary.

[17] May 12, 1995 amendment to application at p. 3, n.1.

with the Commission, we deem the May 12 amendment withdrawn.

This order, and the authorization and license amendment contained herein, are based entirely on the record now before us as that record was compiled at the Commission. This order incorporates as appropriate various mitigation measures voluntarily proposed by Virginia Power in its application, including measures (discussed below) to fully protect the interests of North Carolina, but the order is not premised on any agreements, offers or representations (either express or implied) that occurred as a part of the settlement process.

II. The FEIS

The FEIS notes that Virginia Beach is the largest city in Virginia, with nearly 400,000 residents; that it has no potable water supply of its own and purchases all of its water from the adjacent city of Norfolk; and that several droughts over the past 15 years have caused severe water shortages throughout the area. In response, Virginia Beach has adopted mandatory year-round water restrictions and imposed a moratorium on extensions of its water system. Numerous studies have shown that the five-city area (Virginia Beach, Chesapeake, Norfolk, Portsmouth, and Suffolk) will need at least an additional 60 mgd of water by the year 2030.

The FEIS evaluates the five-city area's need for water by analyzing the supply and demand projections of previous water supply studies using more recent population and per capita water use information, and concludes that the five-city area will need the 60 mgd that would be supplied by the proposed Lake Gaston diversion.[18] The FEIS evaluates other alternatives based on current economics and engineering data, including: (1) groundwater sources, both brackish and fresh; (2) enhancement

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[18] The project will withdraw a maximum 60 mgd of initial water in order to provide approximately 54 mgd of finished water. This discrepancy is associated with normally-expected system losses.

of fresh and brackish surface water sources; (3) alternative water management options including aquifer storage and recovery, surface reservoir enhancement, conservation, and wastewater recycling; (4) desalination of saline surface and groundwater supplies; and (5) combined use of several sources and management options. The FEIS finds that the two alternatives reasonably available to Virginia Beach are desalination of ocean water; and conjunctive use of several sources including wastewater recycling, reservoir enhancement, increased groundwater pumping, and desalination of ocean water. The FEIS then evaluates these two alternatives, a no-action alternative in which Virginia Beach receives no additional supplies, and the Lake Gaston proposal, in terms of their respective impacts to fish and wildlife, wetlands, land use, socieoeconomics, water availability, water quality, and air quality. These environmental resources are evaluated, where applicable, within the following geographic zones: (1) the Lake Gaston area, including adjacent reservoirs and counties; (2) the lower Roanoke River Basin, from the Roanoke Rapids Dam to Albemarle Sound; (3) the upper Roanoke River Basin, from the headwaters in the Blue Ridge Mountains of Virginia to the Kerr Reservoir; (4) the pipeline route and adjacent counties in Southern Virginia; and (5) the terminus environment, including the southside Hampton Roads five-city area.

To determine the environmental impacts of the water withdrawal from Lake Gaston, the FEIS assesses the effects of the withdrawal on river flow, and concludes that the impacts from the water supply project will not adversely affect water availability in the reservoir area, the upper basin, or the lower basin. The water supply project will, however, temporarily affect 19.5 acres of wetlands, and permanently affect 0.7 acres of wetlands, both along the 76-mile pipeline corridor (outside the project boundary). In addition, the water supply project will result in the conversion of 10.22 acres of forested wetland to emergent wetlands along Ennis Pond Channel in the terminus area. The withdrawal of 60 mgd of water from Lake Gaston will reduce hydroelectric generation at the Gaston and

Roanoke Rapids Project by 7,930 megawatt hours annually, or approximately 1.1 percent of total annual generation. Replacing this lost energy with generation from coal-fired power plants will result in the release of pollutants into the air.

The FEIS concludes that the proposed water supply project will ensure a safe, reliable, and relatively inexpensive source of potable water for Virginia Beach and secondary users now and in the future, and that it is the best source for meeting Virginia Beach's and other municipalities' potable water needs. The project will have similar minor environmental effects as the other alternatives but at 32 percent of the cost of the equally reliable desalination alternative and at 58 percent of the cost of the less reliable conjunctive use alternative.

The FEIS recommends the following measures as mitigation for the proposed water supply project: (1) the provision of 1/3 acre walleye spawning area in Pea Hill Cove (within the project boundary); (2) the use of Virginia Beach's 10,200 acre feet of storage in Kerr Reservoir to mitigate for project impacts on reservoir releases on behalf of striped bass; (3) the creation of 11.67 acres of wetlands mitigation pursuant to the Corps' section if any unidentified archeological or historical resources are found during construction, all land-disturbing activities must cease, and the Virginia State Historic Preservation Office must be consulted.

The FEIS contains a separate chapter analyzing the pertinent portions of the May 12, 1995 amendment to the application. The FEIS concludes that the proposed project would be beneficial and not deleterious to the environment, in the manner and for the reasons summarized above, either with or without the pertinent changes effectuated by the amendment to the application as those pertinent changes are discussed in the FEIS.

III. Pending Motions

During the course of the proceeding, and particularly during the pendency of the CZMA proceeding before the

Secretary of Commerce, certain parties filed motions (and answers thereto) variously urging us either to delay or accelerate processing of the instant application. Those motions have been rendered moot by the issuance of this order.

One such motion for stay, however, requires consideration here, in that it raises an issue of compliance with the Clean Water Act (CWA). Section 401(a)(1) of the CWA[19] requires an applicant for a federal license or permit to conduct any activity which may result in any discharge into navigable waters to obtain from the state in which the discharge originates certification that any such discharge will comply with applicable water quality standards. As noted above, The Virginia Water Control Board issued water quality certification for the Lake Gaston water supply project on September 12, 1983; the Corps relied on that certification in issuing Virginia Beach a dredge and fill permit under section 404 of the CWA; and the dredge and fill permit was sustained on court review.

On May 31, 1994, the State of North Carolina filed a motion for a stay of the proceeding based, *inter alia*, on a contention that the Commission cannot amend Virginia Power's license unless and until Virginia Power obtains water quality certification (or waiver thereof) from North Carolina. It argues that, while the place of discharge for purposes of the dredge and fill permit is in Virginia (the location of the land disturbance that gives rise to the need for that permit), the water supply project will also affect the water quality in the hydropower project's discharge, which is from a dam located in North Carolina. The Roanoke River Basin Association and the Town of Weldon, North Carolina, filed an answer in support of

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[19] 33 U.S.C. § 1341(a)(1).

the motion,[20] while Virginia Power and Virginia Beach filed answers opposing the motion.[21]

We need not reach most of the numerous alternative arguments advanced in the pleadings on this issue. Section 401(a)(1) of the CWA provides, in pertinent part, that "[a]ny applicant for a Federal license or permit to conduct any activity including . . . the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . ." However, even assuming, ***arguendo***, that the proposed amendment to the Project No. 2009 license to accommodate the construction and operation of Virginia Beach's water supply project is subject to the provisions of section 401(a)(1), the amendment does not trigger the requirement for certification under that section. Section 4.38(f)(7)(iii) of the Commission's regulations[22] provides in pertinent part:

> [A]ny application to amend an existing license . . . requires a new request for water quality certification . . . if the amendment would have a material adverse impact on the water quality in the discharge from the project . . . .

The impact of an approximately one percent reduction in flow releases into the Roanoke River from the project dam is exhaustively analyzed in the FEIS, as summarized above and discussed below. We conclude, based on that analysis, that the

[20] The Roanoke River Basin Association and the Town of Weldon reiterated their position in comments filed on the DEIS on March 13, 1995 (comments at 14-15), and in the Roanoke River Association's July 13, 1995 response (at 2-5) to North Carolina's July 10, 1995 motion.

[21] In its motion of July 10, 1995, discussed below, North Carolina reiterated its position with respect to the water quality certification issue. *See* motion at pp. 24-26.

[22] 18 C.F.R. § 4.38(f)(7)(iii).

amendment to the license will not have a material adverse impact on the water quality in the discharge from the project. Accordingly, the license can be amended without water quality certification (or waiver thereof) from North Carolina. The analysis and conclusions of the FEIS that the project will not significantly affect water quality concur with the findings in the Corps' Final Supplemental Environmental Assessment.

As noted above, on July 10, 1995, North Carolina filed a procedural motion in which it reiterated its request for an evidentiary hearing with cross examination of witnesses under oath before an administrative law judge.[23] The Commission, however, has ample authority to make its determinations herein on the basis of data and other evidence submitted and evaluated in written form without cross examination of live witnesses.[24] The facts relevant to resolution of this proceeding are technical and scientific in nature. These facts can be properly and adequately evaluated on the basis of written submissions and responsive written submissions. North Carolina does not allege any issues concerning the motives, credibility or intent of relevant witnesses, nor has it demonstrated any other useful

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[23] The Roanoke River Basin Association filed, on July 13, 1995, a response in support of North Carolina's motion, and Virginia Beach filed, on July 17, a response in opposition to the motion. North Carolina and the Roanoke River Basin Association question the validity of the data used to estimate population growth and water use. The FEIS presents a full explanation of how the population projections and per capita water use estimates were derived (see pages 1-12). Wherever possible the staff made use of the most recent, documented information available, and was deliberately conservative in its estimates. We have reviewed the information filed by North Carolina and the Roanoke River Basin Association and confirm that the values of the FEIS are both valid and current. No re-calculation or adjustment of these figures is warranted.

[24] *See, e.g., Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993); *Louisiana Ass'n of Independent Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113-15 (D.C. Cir. 1992).

purpose that would be served by providing an opportunity to examine and cross examine the scientists, economists, and other professional experts as they offer data and analysis into evidence.

This proceeding has now been actively pending before the Commission for more than four years. During that period, North Carolina has had ample and repeated opportunity to present its data and views, and to analyze the data and views presented by the other parties as well as the data and views advanced by the Commission's staff in its draft environmental documents. Indeed, North Carolina has been a very active participant in this and related proceedings, and has amply availed itself of every opportunity to submit and comment on data and other evidence. North Carolina, in its motion, has not identified any witness it would proffer or cross examine at a live hearing, nor has it made any other showing of what it would hope to accomplish at such a hearing that has not already been accomplished through its written submissions. Indeed, as we read the motion, North Carolina's real concern is not the procedures by which the data is elicited and evaluated but the data and analysis itself, and the conclusions derived therefrom. The record before us is exhaustive. We do not perceive any useful purpose to be served by setting this case down for a hearing before an administrative law judge, nor any justification for the delay such a procedure would entail. Accordingly, we deny the motion for an evidentiary hearing before an administrative law judge.

On July 14, 1995, North Carolina and the Roanoke River Basin Association filed a joint motion that reiterates, again, their position with respect to section 401 of the Clean Water Act. The motion requests that the Commission condition any order approving the project on the issuance by North Carolina of a water quality certification or waiver. North Carolina states that it will seek rehearing and court review of any such order, and further requests that the Commission stay the effectiveness of any such order pending rehearing and court review.

Having now determined that water quality certification by North Carolina is not required, we deny the request for the condition. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705, i.e., the stay will be granted if the Commission finds that "justice so requires."[25] Under this standard, the Commission considers a number of factors related to the public interest, such as whether the movant will suffer irreparable injury in the absence of a stay.

The gravamen of North Carolina's and the Association's position throughout this proceeding is that the injury that the water supply project would cause them is a shortage of water in the Roanoke River. No such irreparable injury is alleged in the motion for a stay, however, nor could it be, because no water will be withdrawn from the river until after the lengthy process of constructing the water pipeline has been completed. The only irreparable injury alleged by the movant is that trees will be cut and wetlands disturbed along the right-of-way of the water pipeline. That right-of-way lies entirely in Virginia; the FEIS has determined that those impacts will be minor; and (as noted above) the courts have upheld the comparable environmental determinations of the U.S. Army Corps of Engineers with respect to that pipeline and its right-of-way. The movants have not made a showing adequate to convince us that justice requires grant of a stay. Accordingly, the motion for a stay is denied.

On July 20, 1995, the U.S. District Court for the District of Columbia issued an order staying the effectiveness of the Secretary of Commerce's Decision and Findings in the CZMA proceeding. On July 21, North Carolina filed a letter contending that the Commission cannot issue this order absent a lifting of that stay because the Secretary's determination is a prerequisite to amendment of the license. On July 24, Virginia Beach filed an answer to North Carolina's letter.

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[25] *See, e.g., Clifton Power Co.*, 58 FERC ¶ 61,094 (1992).

The CZMA proceeding is separate and apart from the Commission's proceeding herein, which is grounded in the Commission's responsibilities under the FPA. The record before the Commission is now complete, and the Commission has made representations to several federal courts in related litigation that it will act on that record as expeditiously as possible in the case pending before it. *See, e.g., In Re City of Virginia Beach*, 42 F.3d 881, 886 (4th Cir. 1994) ("[W]ith FERC's continuing assurance of expedited treatment and its promise to adhere to a tight schedule, we cannot conclude that the delays have been so egregious as to meet the demanding standards required for us to interfere with the agency process through a writ of mandamus."). The Secretary of Commerce has made the requisite CZMA Determination, and it has not been reversed or remanded. That Determination, although its effectiveness has been stayed, continues to be the operative ruling on the merits of the CZMA proceeding.

Given the current posture of the case, we believe that the most appropriate resolution is to issue this order and to condition the effectiveness of the license amendment and authorization contained herein on the filing by Virginia Beach of proof that the court has lifted its July 20 stay, or until further order of the Commission.[26] This will enable us to faithfully implement the Commission's repeated court representations that we would issue our order on the merits as soon as the record before this Commission is complete, while at the same time according full deference and respect to the court's order of July 20, 1995.

IV. Discussion

Comments on the DEIS and the licensee's amendment to its application were received from elected officials, federal and state agencies, local and regional governments, conservation organizations, private industries, and local residents. Some commenters registered their support for Virginia Beach's

[26] *See, Iroquois Gas Transmission System, L.P., et al.*, 53 FERC ¶ 61,194, at p. 61,795, Ordering Paragraph No. 48 (1990).

proposed use of project waters, requesting expeditious Commission approval. However, many comments were in opposition to the water supply project, asserting perceived deficiencies in the staff's analyses or expressing general opposition to the concept of interbasin water transfers. We discuss below the concerns of the parties who either oppose the water supply project or assert that the DEIS is deficient in some respect.

1. Project Need

The Environmental Protection Agency (EPA), North Carolina, the Sierra Club, the Roanoke River Basin Association, and the Town of Weldon, suggested that the need for the water supply project would be obviated by increased water conservation, development of other local water sources, use of emergency wells, regional water sharing, reduced military employment as a result of the Base Realignment and Closure Act (BRAC), and slower than projected population growth.

In order to assess project need, the Commission staff developed its own water supply and demand projections.[27] These projections assumed continued aggressive water conservation efforts and regional water sharing, and reflected the most recent population growth trends, recent increases in safe yields by several municipalities, and the 1995 BRAC recommendations. The 1995 BRAC recommendations did not in any event affect military bases in south side Hampton Roads, and the consumptive use projections in the FEIS took into account the previous BRAC recommendations. The FEIS concluded that by the year 2030 the five-city area will need the 54 mgd of water that will be provided by the project. We agree with that conclusion for the reasons stated in the FEIS.

2. Downstream Water Quality

The EPA, North Carolina, Sierra Club, and Roanoke River Basin Association raised concerns regarding the water supply project's potential impacts on water quality, especially

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[27] *See* section 1.3 of the FEIS.

dissolved oxygen (DO), in the lower Roanoke River. Specifically these parties expressed concern over "depressed DO events" and limits on future economic growth by further reduction of the lower Roanoke River's waste assimilative capacity.

The FEIS evaluated water quality information from various sources. Based on this evaluation, the FEIS determined that the RTI model[28] and documented water quality data were adequate to draw sound conclusions regarding the proposed project's potential impacts on assimilative capacity. Other available information (such as the North Carolina Division of Environmental Management (NCDEM) model) was evaluated and found to be either unreliable or not specific to the area of potential impact.[29] The RTI model indicated that, depending on other physical conditions, the effect of the 60 mgd withdrawal on DO levels in the lower Roanoke River would be either negligible or nonexistent.

The FEIS also included a statistical assessment of documented water quality data (primarily NCDEM-generated) to determine correlation and sensitivity of DO levels to these variables. These findings support the conclusion that DO levels are not sensitive to low flow conditions, but are very sensitive to temperature changes. The staff's analysis of water quality data collected between 1988 and 1993 indicates that previous low DO events occurred under relatively high water temperatures and generally during high flow events. The withdrawal of 60 mgd will not measurably affect water temperatures in the Roanoke River. Additionally, there is no statistical support for the claim that the existing assimilative capacity will be compromised.[30]

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[28] The RTI model refers to the Research Triangle Institute's wasteload model for the lower Roanoke River, RTI Project No. 434N33228-2, November 1986.

[29] *See* sections 3.3.3 and 4.1.3.2 of the FEIS.

[30] *See* section 4.1.3.2 of the FEIS.

In summary, the above analyses support the conclusion that the project will have no measurable impact on water quality in the lower Roanoke River. We agree with that conclusion, for the reasons stated above and in the FEIS.

3. Fisheries Resources

The Department of the Interior, NMFS, EPA, and North Carolina raised concerns regarding the potential effects of the proposed water supply project on fishery resources in the Roanoke River. Of primary concern are potential impacts to striped bass and shortnose sturgeon.

Concerns for Roanoke River striped bass have largely focused on the need to manage flows to enhance reproductive success. At issue is the potential impact of water withdrawals on the ability to successfully manage flows for striped bass.

Striped bass spawning in the lower Roanoke River typically occurs near Roanoke Rapids (immediately downstream from the project's Roanoke Rapids development). Fertilized striped bass eggs are semi-buoyant and develop into larvae in a few days while drifting downstream. After several more days the larvae begin feeding. It is important that the initiation of feeding correspond with the arrival of larval striped bass in the estuary where prey resources are highest. For this reason larval transport timing is likely a critical component of reproductive success.

Current flow management for striped bass in the lower Roanoke River (downstream of the proposed project) was implemented by North Carolina in cooperation with the Corps of Engineers and Virginia Power. This action was taken in response to the declining striped bass population trend. Flow management consists of releasing flows during the spawning period (April, May, and June) that fall within a specified range of maximum and minimum flows. The water supply project will not affect the frequency of days meeting these criteria.[31] Regarding larval transport timing, average flows during the

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[31] *See* section 4.1.3.1 of the FEIS.

striped bass spawning period will decrease, resulting in an increase in the transport time for larval striped bass of less than four hours. However, the natural effects of winds and tides often vary transport rates by as much as a full day. Any potential delay associated with the withdrawal will be subsumed in the natural variability in river flow. Therefore, the project will not affect mortality rates associated with larval striped bass transport time.[32] In summary, the project will not affect the reproductive success of striped bass in the Roanoke River.

NMFS, EPA, Interior, and North Carolina suggest that a flow regime which resembles the pre-impoundment flows (the flows that occurred before the project dams were built) would best serve the aquatic resources of the Roanoke River. The Roanoke Water Flow Committee (RRWFC), an advisory committee comprising representatives from federal, state, and private organizations, developed a 365-day flow regime based on pre-impoundment flows that recommends minimum and maximum flows for the lower Roanoke River.[33] North Carolina asserts that the agencies will recommend a pre-impoundment flow regime during relicensing and that the 60 mgd withdrawal will significantly reduce the amount of water available to achieve these flows.

The FEIS evaluated whether the water withdrawal would limit the feasibility of implementing a pre-impoundment flow regime. The withdrawal equates to approximately 1.7 percent of the water needed to meet the RRWFC's proposed minimum annual flows. HEC-5 analysis (a computer-based flow model

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[32] *Id.*

[33] The RRWFC has recommended, and the Corps of Engineers and Virginia Power has adopted, a 76-day period during the striped bass spawning period during which mitigation flows are released to enhance spawning conditions. The RRWFC subsequently proposed extending the existing flow mitigation period to a 91-day flow regime. The Corps has not adopted the proposed 91-day regime, but Virginia Power is currently complying with the 91-day proposal on a voluntary basis.

developed by the Corps of Engineers) indicates that, even without the withdrawal, flows would fail to meet RRWFC's recommended 365-day flows approximately 50 percent of the time. Furthermore, the withdrawal will not increase the number of years failing to meet the RRWFC's recommended flows. Therefore, the water supply project will not significantly affect the feasibility of adopting a pre-impoundment flow regime, if that should be found necessary in some future proceeding.

Both Interior and NMFS state that shortnose sturgeon, an endangered species, may occur in North Carolina watersheds such as the Roanoke River. There is no recorded evidence of any shortnose sturgeon being collected in the Roanoke River. The nearest reported collection was from the Chowan River in 1881. Other, more recent, anecdotal references to the appearance of shortnose sturgeon in other bodies of water in North Carolina do not constitute evidence of the existence of shortnose sturgeon in the Roanoke River.

But even assuming, ***arguendo***, that there were any shortnose sturgeon in the Roanoke River, the proposed project would not have any impact on them. The only important shortnose sturgeon habitat characteristics that the project will affect are river depth and velocity. Shortnose sturgeon prefer deep water (15 to 40 feet) with river velocities between 30 and 76 centimeters per second (cm/s) for juvenile and spawning adults. Our analysis indicates that the flow reductions associated with the proposed withdrawal would decrease mean river velocities by less than one cm/s and decrease depth by less than three inches. We conclude that the minor changes in velocity and depth associated with the proposed project will not significantly affect shortnose sturgeon habitat in the lower Roanoke River.[34]

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[34] This determination was expressed to NMFS in a letter of May 22, 1995, from J. Mark Robinson, Director, Division of Project Compliance and Administration, to Rolland A. Schmitten, Assistant Administrator for Fisheries, NMFS.

4. Consumptive Use Estimates

The FEIS developed consumptive use estimates for the entire Roanoke River Basin to project future demand for water within the basin.[35] Virginia Beach, EPA, North Carolina, the Sierra Club, Interior, and the Roanoke River Basin Association questioned the accuracy of the staff's estimates. Virginia Beach contended that the estimates are too high, while the others questioned whether the staff's projections are high enough to account for increases in consumptive water demand generated by reasonably foreseeable economic development in the Roanoke River Basin. Some parties questioned whether certain proposed future consumptive uses had been included in the staff's projections.

In deriving its consumptive demand projections for the Roanoke River Basin, the Commission staff reviewed the projections developed by North Carolina and Virginia Beach through 2010,[36] and independently projected consumptive use to 2030 using long-term population and employment forecasts. The FEIS also verified that known economic development proposals with large consumptive use demands had been included in the modeling analysis. The FEIS concludes that the consumptive use projections are accurate and address proposed future consumptive uses. We agree with the conclusions and analysis in the FEIS for the reasons stated therein.

5. Socioeconomics

EPA, North Carolina, the Roanoke River Basin Association, and the Town of Weldon raised concerns that the permanent removal of 60 mgd from the Roanoke River Basin would constrain future downstream economic development by making less water available for consumptive use by business and industry, and by reducing the assimilative capacity available to businesses needing to discharge effluent to the river.

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[35] *See* section 4.1.1.1 of the FEIS.

[36] *See* section 4.1.1 of the FEIS.

The FEIS modeled the combined effects of the proposed withdrawal and other existing and future consumptive water demand within the basin. This information was used to estimate potential changes in the Roanoke River's flow and assimilative capacity. The analysis showed that sufficient water would be available to meet the consumptive water demands of both Virginia Beach's proposed withdrawal from Lake Gaston and projected economic development through 2030.[37] The FEIS also determined that the Roanoke River's assimilative capacity will not be reduced and that upstream consumptive users and wastewater dischargers will not be affected.[38] As a result, there will be no long-term reduction in employment and income within the Roanoke River Basin attributable to Virginia Beach's water supply project.[39]

6. Reservoir Storage

The amended application calls for use of storage in Kerr Reservoir, located upstream of Lake Gaston, to replace water withdrawn via Virginia Beach's pipeline on a gallon-for-gallon basis when flows downstream of Roanoke Rapids Dam are below the Roanoke River Water Flow Committee (RRWFC) striped bass target flows. The Roanoke River Basin Association is concerned that Kerr Reservoir storage may not be sufficient to meet this requirement.

In 1971, the Corps, Virginia Power, and the North Carolina Wildlife Resources Commission entered into a memorandum of understanding for the release of target flows to enhance striped bass spawning conditions. In 1988, the RRWFC revised these target flows to encompass 76 days during

[37] *Id.*

[38] *See* sections 4.1.3.5 and 4.1.4.3 of the FEIS.

[39] Commission staff also evaluated the potential impacts of the project on low-income and minority residents in the lower Roanoke River Basin and the southside Hampton Roads area (including Virginia Beach), and concluded that such residents will not be disproportionately affected. *See* section 4.1.7.1 of the FEIS.

the spawning period. In 1989, the 1971 memorandum of understanding was revised to incorporate these 76-day target flows. This revised memorandum of understanding remained in effect from 1989 through the 1993 spawning season. The Corps, however, has informally agreed to extend the 76-day target flows through the year 2000. As discussed above, the RRWFC subsequently recommended extending the 76-day period of target flows to a 91-day period. The Corps has not adopted this recommendation, but Virginia Power voluntarily complies with the 91-day target flow period to the extent possible.

The FEIS thoroughly analyzed the impact of the water supply project on meeting striped bass target flows.[40] Staff modelled flows to determine the number of days during the 76- and 91-day flow regimes that Virginia Beach would be able to release 93 cfs from its storage in Kerr Reservoir to offset its withdrawals from Lake Gaston. The FEIS determined that Virginia Beach's storage would be sufficient to completely replace pipeline withdrawals every day of the 76-day flow regime (for modeled years 1966 to 1969, 1971, and 1981). Similarly, Virginia Beach would be able to use its stored water to replace withdrawals on a gallon-for-gallon basis for every day of the proposed 91-day flow regime except for modeled year 1981 (the drought of record), when mitigation storage could supply 93 cfs on only 86 of the 91 days. We agree with the conclusions and analysis in the FEIS for the reasons stated therein.

7. Incremental Withdrawal

Interior and EPA recommend that the Commission approve an interim withdrawal allocation to provide water necessary to meet Virginia Beach's immediate and short-term demand only (six to ten years). Then, after some unspecified period, a permanent rate of withdrawal could be approved. Interior and EPA prefer this alternative to approval of the full

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[40] *See* section 4.1.3.1 and appendix D of the FEIS.

withdrawal request, because it would allow the Commission to gather more information before it acts on the full request.

Approval of only an interim withdrawal would introduce a significant level of uncertainty regarding a future water supply for Virginia Beach. We conclude that the 60 mgd withdrawal will have no significant impacts. Therefore, an incremental withdrawal is unwarranted. Furthermore, the relative cost of Lake Gaston water would serve as an incentive to minimize withdrawals and to use other, cheaper sources to the extent possible. We find no evidence in the 15-year record of intensive analysis associated with Virginia Beach's project to justify a delay of the permanent decision, and our own analysis identified no significant impacts associated with the project. Therefore, we will not adopt the recommendation of EPA and Interior.

8. Conditions

Citing section 10(j) of the FPA, the U.S. Fish and Wildlife Service (FWS) recommended including a series of special articles in any order approving Virginia Beach's nonproject use of project lands and waters and amending Virginia Power's license accordingly. However, section 10(j) does not apply in this proceeding, because the amendment is not a "licensing action" subject to those parts of the FPA, such as section 10(j), that apply at licensing.[41] Accordingly, we reviewed FWS' recommendations under the comprehensive development standard of section 10(a)(1) of the FPA. We agree with these conditions and include them in the license amendment issued herein, modified as appropriate. See new Articles 44, 46 and 47 of the license, as adopted in Ordering Paragraph (C) of this order.

Virginia Power's application and our authorization herein in response to that application, are specifically predicated

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[41] A "licensing amendment" is one that authorizes a significant new project work, such as a new turbine/generator, an increase in the height of the project dam, or the like. *See, e.g., Adirondack Hydro Development Corp.*, 50 FERC ¶ 61,100 (1990), at pp. 61,318-19.

on the need for water in Virginia Beach and its immediately surrounding area. Accordingly (with the exception of emergency water deliveries to communities along the route of the water pipeline), our authorization is commensurately limited to that stated purpose, and does not include authority to transfer or sell water from Lake Gaston outside of that designated region.

V. North Carolina will be Fully Protected

The FEIS's analyses and conclusions are very protective of North Carolina's interests. The FEIS used very conservative assumptions in its analyses of future consumptive use, water quality impacts, and flow and lake level reductions, to ensure that there will be no significant impacts to North Carolina.

The Commission's approval of the water withdrawal project will directly benefit North Carolina through the use of the 10,200 acre feet of storage in Kerr Reservoir purchased by Virginia Beach for use as mitigation. New Article 45 of the license, as adopted by ordering paragraph (C) of this order, requires Virginia Power to develop a plan, in consultation with the Corps of Engineers and Virginia Beach, to optimize use of this mitigation storage for downstream enhancement. Because of this additional mitigation storage it will be possible to provide for more days meeting the 76- and 91-day flow regimes than without the proposed project. Based on the FEIS's HEC-5 analysis, even under the worst drought conditions on record, there will be sufficient storage available from the 10,200 acre feet to augment flows during the 76-day striped bass spawning period. During all but the most severe droughts there will be water available from the mitigation storage to augment flows during the 91-day spawning period.

By letter dated July 6, 1995, Virginia Beach has agreed to voluntarily implement a number of additional environmental enhancements. As required in any event by the terms of this order, Virginia Beach will cap withdrawals at 60 mgd. Virginia Beach will not resell the water to any communities outside of southeastern Virginia (except for emergency deliveries to

communities along the route of the pipeline). Virginia Beach has pledged to work with North Carolina to develop a Drought Index that will restrict water withdrawals in low flow conditions. Virginia Beach pledges to maintain "an active and ongoing conservation program," and to "encourage regional conservation programs" Virginia Beach will help finance a hydrilla control program in the Roanoke Basin, and has promised to refrain from taking any measures that might interfere with the recreational use of Lake Gaston.[42]

While almost all of these matters fall beyond the scope of the Commission's jurisdiction, we will closely monitor future developments in the region. We fully expect Virginia Beach to be true to its word, and we will not hesitate to take whatever action may be appropriate in the event that Virginia Beach fails to follow through on its promises.

VI. Conclusion

We have carefully considered all of the evidence in the record before us. We appreciate the efforts of all of the parties in assisting us in compiling such a complete record, and we understand and respect the importance of this case to all concerned. For the reasons discussed above and in the FEIS, we conclude that granting the application for a nonproject use of lands and waters of Project No. 2009, and amendment of the Project No. 2009 license as proposed in order to accommodate that nonproject use, is best adapted to a comprehensive plan for improving or developing the waterway for beneficial public purposes. Virginia Beach will be relieved of the serious water supply problems that have severely constrained the life style of its citizens and clouded its economic future. At the same time, we believe that the conditions to the license will fully protect the vital interests of the people of the Lake Gaston area and the people of North Carolina who are dependent on the continued vitality of the Roanoke River for both economic and recreational uses.

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[42] July 6, 1995 letter at 4-6.

The Commission orders:

(A) For the reasons discussed above, all motions currently pending before the Commission in this proceeding, including the motions filed by North Carolina and the Roanoke River Basin Association on July 10 and 14, 1995, are denied.

(B) The application to authorize the City of Virginia Beach, Virginia, to withdraw up to 60 million gallons per day of water from the Project No. 2009 Lake Gaston reservoir for municipal consumption, and to construct, operate, and maintain within the Project No. 2009 boundary certain facilities for that purpose, as described above, is approved. This authorization is predicated on the need for water in Virginia Beach and its immediate vicinity and (except for emergency deliveries of water to communities along the route of the water pipeline) does not authorize the transfer or sale of water outside of that designated region of Virginia.

(C) The license for Project No. 2009 is amended to include the following new license articles:

> *Article 44.* If, during the course of construction, previously unidentified archeological or historical properties within the project boundary are discovered, the licensee shall ensure the cessation of all land-clearing or land-disturbing activity in the vicinity of the project and consult with the State Historic Preservation Officer (SHPO) to determine the need for additional cultural resource management measures. If needed, the licensee shall ensure the preparation of a cultural resource management plan. The plan shall include, but not be limited to, a description of each discovered property indicating whether it is listed on or eligible for listing on the National Register of Historic Places, a description of the potential effect, the proposed measures for avoiding or mitigating the effects,

documentation of consultation with the SHPO, and a schedule for mitigating the impacts. The licensee shall file its plan and evidence of consultation with the SHPO with the Commission for approval. The Commission reserves the right to require changes to the plan based upon the comments. The licensee shall not permit the resumption of land-clearing or land-disturbing activities until informed by the Commission that the requirements of this paragraph have been fulfilled.

Article 45. At least 90 days prior to the start of operation of the City of Virginia Beach, Virginia's water supply project, the licensee shall file with the Commission, for approval, a plan for post-construction studies to monitor the effectiveness of the walleye spawning facility. The monitoring plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the appropriate federal and state agencies concerning the results of the monitoring; and (3) filing the results, agency comments, and the licensee's response to agency comments with the Commission.

The licensee shall ensure that the plan is prepared after consultation with the United States Fish and Wildlife Service and the Virginia Department of Game and Inland Fisheries. The plan shall include documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall ensure that agencies are allowed a minimum of 30 days to comment and to make

recommendations before filing the plan with the Commission. If a recommendation is not adopted, the filing shall include the reasons, based on project-specific information.

If the results of the monitoring indicate that changes in the spawning facility are necessary to protect fish resources, the Commission may direct that the licensee ensure that the facility is modified.

Article 46. At least 90 days prior to the start of the water withdrawal, the licensee shall file with the Commission, for approval, a plan detailing how the 10,200 acre feet of storage volume in Kerr Reservoir is to be used to augment flows in the Roanoke River below the project dams during the striped bass spawning period and during low flow conditions. The plan shall include but not be limited to, the following: (1) a detailed description of conditions under which the 10,200 acre feet in Kerr Reservoir would be released for downstream flow mitigation; (2) procedures that will be implemented to coordinate the storage volume releases among the licensee, the U.S. Army Corps of Engineers (Corps), and the City of Virginia Beach (City); and (3) a schedule for filing annual reports on Kerr Reservoir storage volume releases to the Corps, the City, the Virginia and North Carolina resource agencies and the Commission.

The licensee shall prepare the plan after consultation with the Corps and the City. The licensee shall include with the plan documentation of consultation, copies of comments on the completed plan after it has been prepared and provided to the Corps and the City, and specific descriptions of how the

Corps' and the City's comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the Corps and the City to comment and to make recommendations before filing the plan with the Commission. The Commission reserves the right to require changes to the plan to ensure that the available storage in Kerr Reservoir is used to enhance flows during the striped bass spawning period and for low flow augmentation.

Article 47. The Commission reserves the right, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies, to require alterations of water withdrawal project intake structures and operations for the purpose of protecting aquatic resources downstream of the Roanoke Rapids Dam from environmental impacts caused by the withdrawal of water from the Lake Gaston reservoir to supply water to Virginia Beach.

Article 48. In order for the Commission to monitor the City of Virginia Beach's compliance with the maximum withdrawal rate of 60 mgd, the licensee shall monitor pipeline withdrawals. The licensee shall file, within 90 days prior to the initiation of water withdrawals, a plan for monitoring project withdrawals and maintaining records to ensure that withdrawals do not exceed the approved maximum rate of 60 mgd.

(D) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in section 313(a) of the FPA. The filing of a request for rehearing does not operate as a stay of any aspect of this order, except as specifically ordered by the Commission.

(E) The amendment of the license and the authorization contained in this order shall not become effective until Virginia

Beach files, with the Secretary of the Commission, proof that the United States District Court for the District of Columbia has lifted the stay of the Determination of the Secretary of Commerce under the Coastal Zone Management Act (which Stay is set forth in the order issued by the court on July 20, 1995, in ***State of North Carolina v. Ronald H. Brown***, Civil Action No. 94-1569) and that the Determination of the Secretary of Commerce has become effective, or until further order of the Commission (whichever first occurs).

Virginia Electric and Power Company, Project No. 2009-008

Order Denying Rehearing and Denying Stay

(Issued September 22, 1995)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On July 26, 1995, the Commission issued its order approving non-project use of project lands and waters and amending license.[1] The order was based on, and incorporated by reference, the Final Environmental Impact Statement (FEIS), issued on July 7, 1995.

Three parties, the Sierra Club and (jointly) the State of North Carolina and the Roanoke River Basin Association (North Carolina), filed timely requests for rehearing accompanied by requests for a stay. For the reasons discussed below, we will deny rehearing and deny the stay.

In addition to the requests for rehearing from certain parties in the case, the Commission has also received a number of letters from non-parties, some after the statutory deadline for seeking rehearing, that in one context or another employ the term "rehearing." None of the letters seeks to intervene late in the proceeding. Because only parties have standing to seek rehearing, we will place the letters in the public file associated with this docket but will not specifically address in this order the particular issues they raise. We do, however, welcome and appreciate these letters and have carefully considered the views expressed therein. The Commission recognizes the importance of this proceeding to the many people affected by it, particularly those living in the area of Lake Gaston, and has made a special effort to condition the license in such a manner as to respond to

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[1] 72 FERC ¶ 61,075. On August 23, 1995, the Commission's Secretary issued a brief Errata to the order which, among other things, renumbered the five new license articles from 43 through 47 to 44 through 48.

these concerns and to ameliorate any impacts to the greatest extent feasible.

Discussion

A. *Sufficiency of the Record and Environmental Analysis*

1. *The Need for the Water*

North Carolina and the Sierra Club contend that the FEIS used inflated values for the population projection and per capita use and ignored other data. They contend that these alleged deficiencies in the FEIS cast doubt on the need for the project.

That there is a need for a reliable water source for Virginia Beach (and the surrounding south side Hampton Roads area) cannot be disputed. Virginia Beach, which has no water supply of its own, had water use restrictions in place in 1977, rationing from 1980 to 1981, and various water use restriction episodes from 1985 to 1992. Virginia Beach has been under mandatory long-term restrictions on water use, and water system connections, since 1991, and (also since 1991) Virginia Beach's sole supplier, Norfolk, has set severe limits on water deliveries to Virginia Beach. The FEIS contains a detailed chronology and explanation of water use restrictions in the five-city area.[2]

The FEIS confirms abundant prior documentation of the fact that Virginia Beach is currently suffering under a water supply deficit, and that this deficit will only worsen with time. *See*, for instance, *State of North Carolina v. Hudson*, 731 F. Supp. 1261, 1266, 1272 (E.D.N.C. 1990), in which the U.S. District Court upheld the findings of the U.S. Army Corps of Engineers, based on "searching analysis" of available information, that Virginia Beach would need the entire 60 million gallons per day (mgd) of water by the year 2030. These findings were specifically affirmed -- in the context of approving the Corps' issuance of the dredge and fill permit for the very project at issue before us today -- by the U.S. Court of Appeals

[2] *See* pages 1-4 through 1-6 of the FEIS.

in *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 66 (4th Cir. 1991) (emphasis added):

> Gaston Lake pipeline is a controversial project because it will remove a substantial amount of water from one river basin to a distant area. However, there is no longer any controversy concerning either the environmental effects on the Roanoke River, or the need for a new supply of water in Virginia Beach, in both absolute terms and relative to the needs of northeastern North Carolina.

Our review of the data compiled since the *Hudson* decisions confirms that Virginia Beach's need for the water has increased, not decreased. Section 1.3 of the FEIS details the analysis of future water demand as a function of per capita use and population growth trends.[3] North Carolina has not supplied any information on rehearing that would cause us to modify the conclusions reached in the FEIS or the July 26 order.

Several studies conducted since the early 1980s predicted future water supply demands for the five-city area.[4] The FEIS evaluated the five-city area's need for water by analyzing the demand and supply projections of these previous studies using updated information. Although Virginia Beach and Chesapeake would be the primary users of the Lake Gaston water, the FEIS considers the entire five-city area's need for water.

The "United States government projections" to which North Carolina refers are the U.S. Bureau of Economic Analysis (BEA) 1986 projections.[5] The FEIS thoroughly reviewed these data (and others). One of factors used in determining the relative credibility of the various projections was the accuracy of

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[3] *See* pages 1-12 and 1-13, and 1-9 through 1-12, respectively.

[4] *See* Table 1-1 in the FEIS.

[5] *See* rehearing request at pp. 5-6.

the projection relative to actual values. This was verified by comparing projected population growth with actual values (the 1990 Census data). The five-city area's actual 1990 population exceeded the BEA's 1986 projections by 8 percent. Virginia Beach's actual 1990 population also exceeded the BEA 1986 projections.[6] And contrary to North Carolina's assertion, the FEIS did not use the highest population projections.[7]

North Carolina claims that the FEIS used average per capita use figures for the five-city area, with the result that Virginia Beach's demand was over-estimated. The FEIS evaluated regional water demand for the five-city area because of the existing interconnectedness of the system and the growing trend toward regional water sharing.[8] We also took this approach in an effort to be conservative (*i.e.*, in North Carolina's favor), as this approach tends to overestimate system performance. North Carolina disregards the fact that Virginia Beach alone (without regional water sharing) has a projected water deficit of 49 mgd, in comparison to the regional deficit of 31 mgd used by the FEIS to determine need. The FEIS explains in detail the basis for the water supply deficit projection.[9]

North Carolina and the Sierra Club contend that the FEIS failed to take into account the most recent data in developing its water demand projection. In particular, North Carolina cites Exhibit 1 to the State of North Carolina's July 10, 1995 third motion for an evidentiary hearing as more recent evidence that water use is declining. These data are somewhat

[6] In 1992, BEA increased its 2030 population projection from 1,092,000 to 1,209,000, reflecting its tendency to underestimate rapidly growing areas.

[7] The Virginia Employment Commission's estimate (the State of Virginia's official population projection) would be the highest estimate.

[8] North Carolina suggests that the Commission consider only Virginia Beach in evaluating water demand but consider regional water sharing in evaluating water supply. This approach is inconsistent.

[9] *See* pages 1-20 through 1-22 of the FEIS.

misleading, however, as they consider finished water only and are not corrected to account for water from municipal wells or the portion of the population not served by public water. When these values are corrected they do show a recent decline in per capita water use (albeit small). However, we fully expect some year-to-year variations in demand and supply.[10] The demand projections developed by the FEIS are based on trend analysis making use of long-term data sets. Basing long-term demand projections on a single year's data would be unreasonable. If the trend analyses in the FEIS were revised to include the "more recent" data cited by North Carolina it would not significantly change the future demand projections and would in no way alter the final conclusions on project need.[11]

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[10] Short term variability in local population growth and per capita water use can be due to variable economic and hydrologic conditions, and in this case is likely related to the strict conservation measures and growth moratorium in place in Virginia Beach.

[11] On August 30, 1995, after the expiration of the Federal Power Act's (FPA) 30-day statutory deadline for filing requests for rehearing, and well after the completion of the environmental review process and the issuance of the FEIS and the order amending the license, the Roanoke River Basin Association filed a letter asking us to recalculate the demand for water in the year 2030 based on allegedly more current and accurate data. The letter is untimely and will not be considered. *See, e.g.*, section 313(a) of the FPA, 16 U.S.C. § 8251(a), and *In re City of Virginia Beach*, 42 F.3d 881, 886 (4th Cir. 1994) ("[W]ith FERC's continuing assurance of expedited treatment and its promise to adhere to a tight schedule, we cannot conclude that the delays have been so egregious as to meet the demanding standards required of us to interfere with the agency process with a writ of mandamus."). In any event, it would not surprise us if concerted water conservation measures in response to a serious shortage of water resulted in the very lowering of water consumption that the conservation measures were intended to produce. We would not regard the success of water conservation measures in the face of a shortage as indicative of a lessening of the need for more water.

2. *Virginia Beach's Water Supply*

The calculations and assumptions used to estimate the water supply deficit for the five-city area are explained in detail in section 1.3.4 of the FEIS. This estimate takes into account considerations of public health and safety, and is consistent with the Corps of Engineers' water management criteria, the Virginia Department of Health's standards, and other management standards for water supply planning.

North Carolina questions the treatment of emergency wells in the FEIS analysis of water supply.[12] Virginia Beach drilled five emergency wells in response to the 1981 drought. The Virginia Department of Environmental Quality (VDEQ) restricts the use of these wells to municipally-declared water emergencies with mandatory water use restrictions enforceable by fines. As of 1993, the VDEQ did not consider these wells in their safe yield estimates for local governments. The Corps, as of 1994, considered these wells only as protection against extreme droughts.

These wells are located in, and owned by, the surrounding jurisdictions and leased by Virginia Beach (Suffolk - 2 wells, Isle of Wight County - 2 wells, Southhampton - 1 well). These jurisdictions have consistently opposed any expansion or repermitting of the wells. The leases for the wells expire between 1996 and 1998. The jurisdictions controlling these wells indicate that they do not intend to renew the leases.

Norfolk actively objects to the use of these wells for quality control reasons (high total dissolved solids and salinity). Norfolk predicts that use of these wells would threaten the integrity of the Norfolk water treatment system and Norfolk's ability to comply with drinking water standards. Our treatment of the emergency wells is consistent with municipal water supply planning practices and with the Corps' analyses.

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[12] Rehearing request at pp. 23-24.

North Carolina alleges[13] that the City of Chesapeake is successfully operating an aquifer storage and retrieval (ASR) system, and that the FEIS is flawed because it doesn't take that system into account in discussing water supply alternatives. Whether or not Chesapeake has a functioning ASR system, however, is irrelevant to a meaningful analysis of water supply alternatives. An ASR system is not a new source of water; it merely stores water from the existing supply for retrieval at a later date. The existence of an operating ASR system in the City of Chesapeake does not in any way alter our conclusions regarding project need. An ASR system can accommodate only short term (seasonal) supply and demand; it does not resolve the significant long-term regional water deficit described in the FEIS.

3. *Other Contentions*

The other contentions raised on rehearing with respect to the sufficiency of the record and of the environmental analysis have all been previously raised, considered and addressed. The parties have not raised on rehearing any new issue of that nature that convinces us of the existence of any gap, infirmity or inadequacy in the record or in the environmental analysis, or that in any other way persuades us to reconsider our prior order.

Contrary to North Carolina's contentions, the FEIS responded to all of North Carolina's comments on the Draft Environmental Impact Statement (DEIS). In particular, we categorically reject North Carolina's repeated, and thoroughly groundless, assertion that the Commission's staff did not conduct its own independent environmental analysis.[14] As discussed in Appendix E of the FEIS in response to the comments received on the DEIS, the FEIS includes an independent and comprehensive review of existing studies and

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[13] Rehearing request at p. 28.

[14] Rehearing request at pp. 24-27.

analyses. Where appropriate, existing studies were updated with more recent data or independent analyses were conducted.

B. *Request for an Evidentiary Hearing*

In our July 26 order, we carefully considered North Carolina's request, restated in its July 10, 1995 motion, for an evidentiary hearing with cross-examination of witnesses under oath before an administrative law judge, and denied that motion for the reasons discussed in that order.[15] On rehearing, both North Carolina[16] and the Sierra Club[17] renew that request. They have not raised on rehearing, however, any new arguments that have not already been considered or that persuade us to reconsider our prior decision. Accordingly, for the reasons stated in our July 26 order, we deny rehearing of the denial of the motions for an evidentiary hearing with cross-examination of witnesses under oath before an administrative law judge.

C. *Compliance with the Clean Water Act*

In our July 26 order, we carefully considered a motion filed by the State of North Carolina, and supported by the Roanoke River Basin Association, for a stay predicated on an alleged need for the issuance by the State of North Carolina of water quality certification pursuant to section 401(a)(1) of the Clean Water Act (CWA).[18] We determined, for the reasons discussed in that order, that issuance or waiver of water quality certification by the State of North Carolina did not constitute a necessary predicate to the amendment of the license, because the amendment will not have a material adverse impact on the water quality in the discharge from the project.[19]

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[15] 72 FERC ¶ 61,075, at p. 61,934.

[16] Rehearing request at pp. 11-16.

[17] Rehearing request at pp. 7-8.

[18] 33 U.S.C. § 1341(a)(1).

[19] 72 FERC ¶ 61,075 at pp. 61,393-94.

North Carolina[20] and the Sierra Club[21] both seek rehearing of our determination with respect to the Clean Water Act. They have not raised on rehearing, however, any arguments that were not previously considered or that persuade us to reconsider our prior determination. Accordingly, for the reasons stated in our July 26 order, we deny the request for rehearing of our determination that issuance or waiver of water quality certification by the State of North Carolina does not constitute a necessary predicate to amendment of the license.

We note, in this regard, that the Sierra Club contends that the Commission's analysis of water quality impacts is based solely on mean annual flows and fails to consider impacts "during low flows, when flows will be reduced up to ten percent."[22] The FEIS, however, conducted a comprehensive analysis that is not limited to mean annual flows. Sections 3.3.3 and 4.1.3.2 of the FEIS, respectively, review existing water quality conditions and analyze project-related impacts in the Roanoke River below Roanoke Rapids Dam. In its analysis of the effects of the proposed project, the FEIS relied on two separate water quality modeling studies and ambient water quality data collected by the State of North Carolina between 1988 and 1993.[23] Based on that analysis, the FEIS (as incorporated by reference in the order) concluded that the project would not have a material adverse impact on the water quality of the Roanoke River.

There are additional relevant considerations which further undermine North Carolina's position on the CWA section 401 issue. North Carolina's argument that the water

[20] Rehearing request at pp. 16-21.

[21] Rehearing Request at pp. 2-4.

[22] *Id.* at p. 4.

[23] In 1988, the State of North Carolina established four ambient water quality monitoring stations along the lower Roanoke River (Roanoke Rapids, Scotland Neck, Lewiston, and Williamston) as part of the ongoing Albermarle-Pamlico study.

supply project will involve a discharge originating within its borders, and thus requires a CWA section 401 certification, if accepted, would reopen an issue that has already been put to rest by the U.S. Army Corps of Engineers and the courts in the *Hudson* litigation.[24] As we explained in our prior order,[25]

> The Virginia Water Control Board issued water quality certification for the Lake Gaston water supply project on September 12, 1983; the Corps relied on that certification in issuing Virginia Beach a dredge and fill permit under section 404 of the CWA; and the dredge and fill permit was sustained on court review.

Assuming ***arguendo*** that the water supply project will result in a discharge into the navigable waters of North Carolina that originates in North Carolina, as North Carolina claims, the Corps would have been prohibited by section 401 of the CWA from issuing its dredge-and-fill permit, without first obtaining a section 401 certification from North Carolina's CWA certification agency. North Carolina was a party to the Corps' proceeding, yet never raised a section 401 certification issue in that case. We conclude that North Carolina, having failed to assert its section 401 certification claim before the appropriate agency at the appropriate time, has waived its right to demand a section 401 certification prior to our amendment of Virginia Power's license. *Cf. Keating v. FERC*, 927 F.2d at pp. 616, 620 (D.C. Cir. 1991) ("Under section 401(a)(3) of the Clean Water Act, absent other valid objections, FERC was obliged to accept the certification underlying the Corps permit as satisfying

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[24] In *Hudson*, the district court extensively reviewed the Corps of Engineers' findings concerning the project's effect on water quality in North Carolina, and both the district court, *see* 665 F. Supp. at pp. 438-440, and the Fourth Circuit specifically upheld the Corps' conclusion that "the effect on the quality of the water would be insignificant." *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 64 (1991).

[25] 72 FERC ¶ 61,075 at p. 61,391.

the state certification requirement with respect to . . . [the] license application.")

D. *Comprehensive Plan*

Referring to the statutory standard of section 10(a)(l) of the Federal Power Act (FPA), North Carolina contends that the Virginia Beach water supply project is not best adapted to a comprehensive plan for improving or developing the Roanoke River Basin, because the project "will have no beneficial effect on" the Basin.[26]

Section 10(a)(1)[27] provides in pertinent part that the Commission must ensure that the project is:

> best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, ***water supply***, and recreational and other purposes . . . .

Section 10(a)(1) does not, as North Carolina suggests, limit the Commission to improving or developing a waterway or waterways simply for the benefit of the waterway on which a hydropower project is situated. This is clear from the section's reference to the development of a waterway for the use or benefit of foreign commerce. Indeed, hardly any diversion of water from a waterway for purposes of irrigation or water supply will benefit the waterway, since the water will not be returned to the waterway.[28] Rather, the section requires the Commission

[26] Rehearing request at p. 30.

[27] 16 U.S.C. § 803(a)(1).

[28] The term "waterway" is not synonymous with "river basin" or "watershed."

to ensure that a licensed project is used in a manner that benefits the optimal combination of public purposes.[29] That project water will be consumed by people living in a neighboring state and river basin does not nullify the beneficial nature of that use.

For the reasons discussed at length in our July 26 order and in the FEIS, we conclude that the record in this proceeding amply supports our determination that the use of the lands and waters of Project No. 2009 for Virginia Beach's water supply project meets FPA section 10(a)(1)'s standard for comprehensive development of the waterway for beneficial public uses.

E. *Term of Easements*

North Carolina requests that we impose a limit on the term of all easements associated with Virginia Beach's water supply project commensurate with the term of the license, so as to cause all such easements to expire when the license expires.[30] The July 26 order, however, did not confer or establish any easements. The July 26 order authorized certain withdrawals of water from the project reservoir, Lake Gaston, and amended Virginia Power's license to implement that authorization. Those amendments and that authorization remain valid throughout the term of the license, as the license may be extended by annual licenses after the term of the original license

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[29] The comprehensive development standard of section 10(a)(1) continues to apply throughout the license term. *See* S.D. Warren Co., 68 FERC ¶ 61,213 (1994), at p. 62,022. Both project uses and non-project uses are subject to that standard. *See Puget Sound Power & Light Co.*, 54 FPC 157, 160 (1975). What constitutes such comprehensive development is not a static concept. *See National Wildlife Federation v. FERC*, 912 F.2d 1471, 1475 (D.C. Cir. 1990) (quoting the Commission):

> "[C]omprehensive development is a concept that evolves over time, reflecting different eras' technical options, economic realities, and resource use priorities.

[30] Rehearing request at p. 31.

expires. To the extent that Virginia Beach obtains easements to carry out their purposes in furtherance of the license and our authorization in the July 26 order, those easements are governed by their own terms and conditions, including whatever limitations of time (or lack thereof) they may contain. Of course, the entire project, including the use of project lands and waters for non-project purposes, is subject to the relicensing provisions of section 15 of the FPA upon the expiration of Virginia Power's current license.

F. *License Conditions*

North Carolina requests, first of all, that it be included as an entity to be consulted with respect to Virginia Power's responsibilities under Articles 45, 46 and 48 of the license.[31] Article 45 requires consultation by Virginia Power in connection with the monitoring of the effectiveness of the walleye spawning facility. Article 46 requires consultation by Virginia Power in connection with its preparation of the Kerr Reservoir water release plan, to protect fishery resources. Article 48 requires Virginia Power to prepare a plan for monitoring water withdrawals from Lake Gaston for Virginia Beach. We agree that North Carolina should have an active role in reviewing and commenting on these monitoring plans, and accordingly, we will amend these three license articles to require consultation with North Carolina.

North Carolina recommends that Article 46 be amended to specify how storage in Kerr Reservoir is to be used to replace flows on a gallon-for-gallon basis when flows below Roanoke Rapids Dam are below striped bass target flows. North Carolina also questions how potential conflicts with releases for hydroelectric generation will be resolved. Article 46 was originally drafted and incorporated into the license for the purpose of addressing those very issues, and we believe that it is already clear and sufficiently specific in its mandate. Our amendment of that article today, requiring Virginia Power to consult with North Carolina in the development of the plan for

[31] Rehearing request at pp. 32-34.

managing and using the storage volumes, will ensure full consideration of North Carolina's concerns. Any disputes or problems that might arise can always be brought to the attention of our compliance staff, who can promptly investigate the matter in the context of the particular facts presented.

With respect to Article 48, North Carolina also requests that Virginia Power be required to provide periodic reports to North Carolina on the water withdrawals from Lake Gaston. We agree that such reporting is appropriate, and believe that the requirement for consultation that we are adding to Article 48 will enable North Carolina to develop with Virginia Power, during the consultation process, a workable and mutually acceptable reporting procedure that satisfies North Carolina's needs and concerns.

North Carolina also requests that we include as conditions to Virginia Power's license various obligations to which Virginia Beach agreed during the course of the settlement negotiations, including the financing by Virginia Beach of a program to control hydrilla in Lake Gaston, prohibitions on the sale of water by Virginia Beach outside of southeastern Virginia, requirements that Virginia Beach exhaust all local sources of water before using water from Lake Gaston, requirements that Virginia Beach adopt a drought index with a dispute resolution mechanism, requirements that Virginia Beach adopt a conservation program, and prohibitions against Virginia Beach's seeking particular regulations, legislation or standards or attempting to interfere with recreation in Lake Gaston.[32]

First of all, we note that both parties, including North Carolina, formally notified the Commission that the settlement negotiations did not result in a settlement and that both parties to the negotiations are free to adopt whatever positions they wish regardless of the commitments by which they would have been bound had the settlement gone into effect. North Carolina has freely availed itself of that opportunity by vigorously restating its opposition to the water supply project

[32] Rehearing request at pp. 35-39.

for Virginia Beach. North Carolina cannot, in that posture, insist on holding Virginia Beach to the financial (*e.g.*, hydrilla control program financing) and other obligations to which Virginia Beach tentatively agreed in exchange for North Carolina's withdrawal of its opposition to the project. Either there is a settlement or there isn't; either it binds both parties or neither of them.

Secondly, we note that the Commission has jurisdiction only over Virginia Power, the licensee of the hydropower project, and not over Virginia Beach, the sponsor of the water supply project. The Commission can impose requirements on Virginia Power by means of including articles in the license issued to it, and the Commission can utilize its powers under the FPA to enforce Virginia Power's compliance with the terms and conditions of the license, but the Commission has no statutory authority (under the FPA or any other statute) to issue or deny a license to Virginia Beach for the water supply project, to impose requirements or prohibitions on Virginia Beach, or to force Virginia Beach to comply with any such requirements or prohibitions

Finally, we note that a number of the conditions proposed by North Carolina involve matters that are peculiarly local in nature. We believe that such matters are more appropriately regulated at the local level, by the local authorities who are most familiar with such matters, and that federal intrusion by our Commission is unwarranted. Accordingly, for all of the above reasons, we decline to impose such requirements on Virginia Beach as formal conditions of Virginia Power's license.

That having been said, there is one particularly important limitation that does apply. As we emphasized in our prior order[33] and reemphasize here, Virginia Power's application, and our authorization in response to that application, are specifically predicated on the need for water in Virginia Beach and its immediately surrounding area. Accordingly (with the exception

[33] 72 FERC ¶ 61,075 at p. 61,399.

of emergency water deliveries to communities along the route of the water pipeline), our authorization is limited to that stated purpose and does not include authority to transfer or sell water from Lake Gaston outside of that designated region. *See* ordering paragraph (B) of our July 26 order.[34]

G. ***Request for a Stay***

In our July 26 order, we carefully considered North Carolina's July 14, 1995 request for a stay of the effectiveness of the order pending rehearing and judicial review. We determined, for the reasons discussed in that order, that North Carolina had not made a showing adequate to convince us that justice required grant of a stay.

On rehearing, North Carolina repeats its request for a stay. The Sierra Club also requests a stay "to perfect its right to seek a judicial stay."[35] On September 11, Virginia Beach filed an answer to North Carolina's motion.

On rehearing, North Carolina and the Sierra Club have not advanced any new arguments on behalf of the grant of a stay that were not previously considered in our July 26 order, nor have they persuaded us to reconsider our previous denial of a stay. Accordingly, for the reasons stated in our July 26 order,[36] we will deny the requests for a stay of the effectiveness of this order and of our July 26 order.

The Commission orders:

(A) Articles 45, 46 and 48 of the license are amended to read as follows:

> *Article 45.* At least 90 days prior to the start of operation of the City of Virginia Beach, Virginia's water supply project, the licensee shall file with the Commission, for approval, a plan

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[34] *Id.* at p. 61,400.

[35] Rehearing request at p. 9.

[36] 72 FERC ¶ 61,075 at pp. 61,094-95.

for post-construction studies to monitor the effectiveness of the walleye spawning facility. The monitoring plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the appropriate federal and state agencies concerning the results of the monitoring; and (3) filing the results, agency comments, and the licensee's response to agency comments with the Commission.

The licensee shall ensure that the plan is prepared after consultation with the United States Fish and Wildlife Service, the Virginia Department of Game and Inland Fisheries, and the North Carolina Wildlife Resources Commission. The plan shall include documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall ensure that agencies are allowed a minimum of 30 days to comment and to make recommendations before filing the plan with the Commission. If a recommendation is not adopted the filing shall include the reasons, based on project-specific information

If the results of the monitoring indicate that changes in the spawning facility are necessary to protect fish resources, the Commission may direct that the licensee ensure that the facility is modified,

Article 46. At least 90 days prior to the start of the water withdrawal, the licensee shall file with

the Commission, for approval, a plan detailing how the 10,200 acre feet of storage volume in Kerr Reservoir is to be used to augment flows in the Roanoke River below the project dams during the striped bass spawning period and during low flow conditions. The plan shall include, but not be limited to, the following: (1) a detailed description of conditions under which the 10,200 acre-feet in Kerr Reservoir would be released for downstream flow mitigation; (2) procedures that will be implemented to coordinate the storage volume releases among the licensee, the U.S. Army Corps of Engineers (Corps), and the City of Virginia Beach (City); and (3) a schedule for filing annual reports on Kerr Reservoir storage volume releases to the Corps, the City, the Virginia and North Carolina resource agencies, and the Commission.

The licensee shall prepare the plan after consultation with the Corps, the City, and the North Carolina Wildlife Resources Commission and Departmernt of Environmental Health and Natural Resources. The licensee shall include with the plan documentation of consultation, copies of comments on the completed plan after it has been prepared and provided to the Corps, the City, and the North Carolina agencies, and specific descriptions of how the comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the Corps, the City and the North Carolina agencies to comment and to make recommendations before filing the plan with the Commission. The Commission reserves the right to require changes to the plan to ensure that the available

storage in Kerr Reservoir is used to enhance flows during the striped bass spawning period and for low flow augmentation.

Article 48. In order for the Commission to monitor the City of Virginia Beach's compliance with the maximum withdrawal rate of 60 mgd the licensee shall monitor pipeline withdrawals. The licensee shall file, within 90 days prior to the initiation of water withdrawals, a plan for monitoring project withdrawals and maintaining records to ensure that withdrawals do not exceed the approved maximum rate of 60 mgd. The licensee shall ensure that the plan is prepared after consultation with the North Carolina Department of Environmental Health and Natural Resources, including consultation on appropriate reporting requirements.

(B) In all other respects, the requests for rehearing filed by the Sierra Club on August 24, 1995, and (jointly) by the State of North Carolina and the Roanoke River Basin Association on August 25, 1995, are denied.

(C) The requests for rehearing filed by Charnie A. Thompson, Jr., Lewis T. Crowder, Harold E. Carawan, and Maurice Emery, on August 7, 15, 21 and 25, respectively, are rejected as unauthorized, because those persons are not parties to the proceeding and lack standing to file requests for rehearing.

(D) The requests for a stay of the effectiveness of this order and of the order issued on July 26, 1995, filed by the Sierra Club and (jointly) the State of North Carolina and the Roanoke River Basin Association as part of their respective requests for rehearing, are denied.

Virginia Electric and Power Company, Project No. 2009-010

Order on Remand

(Issued November 7, 1996)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On July 26, 1995, the Commission issued its order approving non-project use of project lands and waters and amending license.[1] The order was based on, and incorporated by reference, the Final Environmental Impact Statement (FEIS), issued on July 7, 1995. On September 22, 1995, the Commission issued an order denying rehearing and denying a stay.[2] Thereafter, several parties filed petitions for review of the orders in the U.S. Court of Appeals for the District of Columbia Circuit.[3]

On September 11, 1996, the Court remanded the record of the proceeding to the Commission[4] with instructions to supplement the record within 60 days by making a determination (discussed below) with respect to section 401(a)(1) of the Clean Water Act (CWA).[5] This order is issued pursuant to the Court's mandate.

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[1] 72 FERC ¶ 61,075. On August 23, 1995, the Commission's Secretary issued a brief Errata to the order which, among other things, renumbered the five new license articles from 43 through 47 to 44 through 48.

[2] 72 FERC ¶ 61,283.

[3] *North Carolina v. FERC*, No. 95-1494.

[4] On September 23, 1996, the Court issued an order amending its September 11 order. The discussion below is based on the order as amended.

[5] 33 U.S.C. § 1341(a)(1). The Court has retained jurisdiction over the proceeding pending the remand. In Part B of this order, we clarify one matter. Inasmuch as the Court's September 11 order asked only for a Commission determination on a CWA issue, we will ask leave of the court to include Part B

On October 11, 1996, Virginia Beach filed a memorandum expressing its views on the CWA issues posed by the court's remand. On October 22, the Roanoke River Basin Association (RRBA) filed a response to Virginia Beach, expressing its opposing views on those issues.

On October 24, the U.S. Environmental Protection Agency (EPA) filed a letter expressing for the first time its views that the license amendment triggered an obligation to obtain CWA section 401 certification from North Carolina.[6] On October 28, Virginia Beach filed a letter responding to the EPA's contentions. On October 29, Senator Charles S. Robb, Senator John W. Warner, and Representative Owen W. Pickett, all of Virginia, also filed a letter responding to the EPA's contentions. On October 30, the Deputy Attorney General of Virginia also filed a letter responding to the EPA's contentions. On November 4, the RRBA filed a letter in response to the letter of the Deputy Attorney General of Virginia.

The Commission has carefully considered all of the views expressed in the above-identified filings. The discussion below expresses the Commission's understanding of the requirements of the CWA in the context of the facts and circumstances of this proceeding, in response to both the Court's question and the EPA and the parties' filings. For the reasons discussed below, the Commission concludes that the activity that the Commission approved in this proceeding (the construction and operation of facilities and withdrawal of water for the Virginia Beach water supply project) is not an activity that results in a discharge originating in the State of North Carolina within the meaning of section 401(a)(1) of the CWA.

(Footnote Continued)

in this order on remand.

[6] Letter from Jonathan Z. Cannon, General Counsel, and Robert Perciasepe, Assistant Administrator for Water, EPA, to the Commission's Secretary, with copies to all parties to the proceeding.

Background

The Commission's orders on review authorized the licensee of the Gaston and Roanoke Rapids Project, Virginia Electric and Power Company (Virginia Power), to allow the City of Virginia Beach, Virginia, to withdraw approximately one percent of the flow of the Roanoke River from the project's reservoir, Lake Gaston, for the purpose of alleviating a water shortage in Virginia Beach. The orders also authorized Virginia Power to allow the construction of facilities to withdraw that water and transfer it to a water pipeline to be constructed by Virginia Beach.

Lake Gaston spans the Virginia-North Carolina border. The project's two dams are both located in North Carolina; thus, water exits the project in North Carolina, from where it flows to the Atlantic Ocean via the Roanoke River. Virginia Beach's water supply project, however, is located entirely within the State of Virginia. The water will be withdrawn from Pea Hill Cove, a portion of Lake Gaston that is located in Virginia, and will be transported to Virginia Beach in a water pipeline across Virginia. The new project facilities authorized by the orders to be constructed and operated within the project boundary[7] will be constructed entirely in Virginia.

Pursuant to section 10 of the Rivers and Harbors Act of 1899 (RHA)[8] and section 404 of the CWA,[9] the U.S. Army Corps of Engineers issued to Virginia Beach, on January 9, 1984, a dredge and fill permit to construct the water intake at Lake Gaston and the water pipeline to Virginia Beach. The Corps' dredge and fill permit was predicated on a water quality certification issued to Virginia Beach by the Virginia Water

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[7] *See* 72 FERC at p. 61,390.

[8] 33 U.S.C. § 403.

[9] 33 U.S.C. § 1344.

Control Board on September 12, 1983, pursuant to section 401(a)(1) of the CWA.[10]

In making its determination to issue the construction and dredge and fill permit, the Corps conducted an extensive environmental analysis of the potential impact of the water supply project, including potential adverse impacts on the environment of the Roanoke River downstream from Lake Gaston resulting from the water withdrawal. The sufficiency of that environmental analysis was approved on court review.[11]

In another related proceeding, on March 19, 1994, the Secretary of Commerce issued his Decision and Findings in the Consistency Appeal of the Virginia Electric and Power Company from an Objection by the North Carolina Department of Environment, Health and Natural Resources. The Secretary determined, among other things, that the Virginia Beach water supply project is consistent with the objectives and purposes of the Coastal Zone Management Act (CZMA).[12] In order to make that determination, the Secretary first determined that the water supply project met the requirements of the Clean Air Act and the CWA. With respect to the CWA, the Secretary based his determination on the CWA section 401(a)(1) certification issued by the Virginia State Water Control Board in September of 1983, *i.e.*, the same state

[10] The Corps may issue a construction permit under section 10 of the RHA, and a dredge and fill permit under section 404 of the Clean Water Act, only if the activity to be permitted has received water quality certification (or waiver thereof) under section 401(a)(1) of the Act.

[11] *See North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987); *North Carolina v. Hudson*, 731 F. Supp. 1261 (E.D.N.C. 1990); *Roanoke River Basin Association v. Hudson*, 940 F.2d 58 (4th Cir. 1991); and *North Carolina v. Virginia Beach*, 951 F.2d 596 (4th Cir. 1991).

[12] Pursuant to section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), a finding of inconsistency would have precluded the Commission from allowing Project No. 2009 lands and water to be used for the water supply project.

certification relied on by both the Corps of Engineers and this Commission in exercising their own respective federal regulatory functions with regard to the water supply project.[13] The Secretary of Commerce's CZMA consistency determination was affirmed by the U.S. District Court.[14]

Discussion

A. *The Clean Water Act*

The Court, in its order remanding the record, quoted the following passage from the Commission's July 26, 1995 order:[15]

> However, even assuming, ***arguendo***, that the proposed amendment to the Project No. 2009 license to accommodate the construction and operation of Virginia Beach's water supply project is subject to the provisions of section 401(a)(1) [of the CWA], the amendment does not trigger the requirement for certification under that section. Section 4.38(f)(7)(iii) of the Commission's regulations provides in pertinent part:
>
> [A]ny application to amend an existing license . . . requires a new request for water quality certification . . . if the amendment would have a material adverse impact on the water quality in the discharge from the project . . . .
>
> The impact of an approximately one percent reduction in flow releases into the Roanoke River from the project dam is exhaustively

[13] Determination at pp. 37 and 177 (n.256).

[14] *North Carolina v. Department of Commerce*, Civ. No. 94-1569 (TFH), 42 Env't. Rep. Cas. (BNA) 1254 (D.D.C. Sept. 28, 1995). North Carolina did not appeal the District Court's affirmance, and that ruling is now final.

[15] 72 FERC at pp. 61,393-94.

> analyzed in the FEIS, as summarized above and discussed below. We conclude, based on that analysis, that the amendment to the license will not have a material adverse impact on the water quality in the discharge from the project. Accordingly, the license can be amended without water quality certification (or waiver thereof) from North Carolina.

The Court then directed the Commission, on remand of the record, to answer the following question:[16]

> This language leaves unresolved the question of whether § 401(a)(l) applies to require certification from North Carolina, insofar as the Commission "assum[ed], ***arguendo***" that the answer was "yes" and proceeded to rest its action on section 4.38(f)(7)(iii) of its regulations. Following initial briefing and oral argument, the Court believes that in the interest of judicial economy the Commission should answer this question before we exercise judicial review over the other issues of the case.

The Court of Appeals has thus directed the Commission to determine in the first instance whether the construction and operation of Virginia Beach's water supply project and withdrawal in Virginia of approximately one percent of the flow of the Roanoke River constitutes a "discharge" that "originates" in North Carolina within the meaning of section 401(a)(1) of the CWA. For the reasons discussed below, we conclude that it does not.

We believe it is important to examine section 401(a)(1) within the full context and purpose of the CWA. As discussed more fully below, subsection (1) of section 401(a) requires any applicant for a federal license or permit to obtain -- from the

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[16] Remand at p. 2.

state in which it proposes to conduct an activity to be licensed or permitted -- a certification from that state that the discharge emanating from that activity will be in compliance with the requirements of the CWA. Those requirements are designed to protect the water from pollution.

Subsection (2) of section 401(a) provides a remedy for neighboring states that may be affected by the proposed discharge; such affected states may file a timely objection with the Administrator of the U.S. Environmental Protection Agency (EPA), requesting a public hearing on the potential impact.

Finally, subsection (3) of section 401 (a) provides that the certification, once received from the relevant state in conjunction with the initial federal agency's license or permit "with respect to the construction of any facility shall fulfill," absent a change in circumstances, the certification requirements "in connection with any other Federal license or permit required for the operation of such facility."[17] As quoted below, section 101(g) of the CWA makes clear that Congress did not intend the CWA to be used to allocate water between and among different states. Against the background of this overall statutory scheme, we turn to analysis of the statutory language.

Section 401(a)(1) of the CWA provides, in pertinent part, as follows (emphasis added):

> (1) Any applicant for a Federal license or permit ***to conduct any activity including, but not limited to, the construction or operation of facilities***, which may result in any ***discharge into the navigable waters***, shall provide the licensing or permitting agency a certification from the State ***in which the discharge originates or will originate***, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any

[17] 33 U.S.C. § 1341(a)(3).

> such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . .

The Roanoke River at the site of the project is a navigable water of the United States.[18] Section 502(16) of the CWA defines "discharge" as follows:

> The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

Section 502(12) of the CWA defines "discharge of a pollutant" as "any ***addition*** of any pollutant to navigable waters from any point source . . . ."[19]

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[18] In *Virginia Electric and Power Co.*, 10 FPC 1, 6 (finding no. 4) (1951), the Commission determined that the Roanoke River is a navigable river at the site of the project as that term is used in the Federal Power Act. Section 502 of the CWA (33 U.S.C. § 1362(7)) defines "navigable waters" for purposes of the CWA as "waters of the United States, including the territorial seas," a definition that is broader than the comparable term in the Federal Power Act.

[19] 33 U.S.C. § 1362 (12). Section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" in pertinent part as:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste ***discharged into*** water. [Emphasis added.].

The EPA's regulations contain comparable definitions with respect to its implementation of section 402 of the CWA. *See* 40 C.F.R. Ch. 1 (July 1, 1996 Edition) § 122.2, in which "discharge" is defined as "discharge of a pollutant," and the latter is defined as "any addition of any 'pollutant' to . . . [variously defined waters];" and § 401.11(g) and (h), all of which track the above-quoted definitions in the CWA.

We believe that Congress intended the word "discharge" to include only substances that are added to the water in some manner, and did not intend to include the withdrawal of the water itself within the scope of that term. *See Save Our Community v. Environmental Protection Agency*, 971 F.2d 1155, 1165 (5th Cir. 1992) (removal of water from wetlands does not constitute a discharge within meaning of section 404 of the CWA). We believe that the plain and commonly understood meaning of the phrase "discharge *into* the navigable waters" (emphasis added) is unduly strained if it is read to include the removal of something that was already in the water, and is particularly strained if it is read to include the removal of the water itself.

The contentions the EPA letter[20] do not provide a sound basis for the Commission to reach a different conclusion. At the outset, the EPA asserts[21] that its view of the scope of CWA § 401 (a) is entitled to *Chevron* deference,[22] and then characterizes the "activity" which requires a FERC license amendment as an alleged change in "the terms of operation of

[20] The EPA's letter is untimely in the extreme. As discussed below, North Carolina's remedy under the CWA, as a neighboring affected state, is to petition the Administrator of the EPA (pursuant to section 401(a)(2) of the CWA) for a public hearing on the impact of Virginia Beach's water supply project on North Carolina. North Carolina did exactly that, and on a very timely basis -- in 1983 -- but EPA did not grant the relief requested. Nor did the EPA seek to intervene or participate in the proceeding before the Commission until thirteen years later, after the Commission had acted and the proceeding was pending on court review with the record temporarily remanded to us. In short, instead of timely and actively developing the record in the Commission's proceeding, or developing a record of its own under section 401(a)(2), the EPA speaks up for the first time as a belated, post-proceeding commenter.

[21] Letter at pp. 3-5.

[22] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

the dam in North Carolina." The EPA's views are not, however, entitled to *Chevron* deference because the letter does not "rank[] as an agency adjudication or rulemaking."[23] Indeed, in the context of this case, deference to EPA does not even come into play. We deal here with questions of fact and the application of the licensing provisions of the Federal Power Act that we are charged with administering. Thus, it is *the Commission's* determination of which activity requires a license amendment, as well as the scope of that amendment, that is entitled to *Chevron* deference.[24] As discussed below, we have found that the "activities" which necessitate a Commission license amendment are: (1) the construction of water supply facilities within the Virginia Power project boundary; and (2) the withdrawal of water from Pea Hill Cove in Lake Gaston. In these circumstances, we do not find persuasive (or entitled to deference) the suggestion in the EPA's letter that the "activity" subject to the Federal Power Act's (FPA) license amendment

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[23] *See Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 427 n.19 (D.C. Cir. 1992) (declining to extend *Chevron* deference to SEC staff no-action or *amicus curiae* brief); *see also Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988) (declining to extend *Chevron* deference to "an agency's counsel's interpretation of a statute where the agency itself has articulated no position on the question"); *City of Kansas City, Mo. v HUD*, 923 F.2d 1888, 192 (D.C. Cir. 1991) (same). *See also PUD No. 1 of Jefferson County, et al. v. Washington Department of Ecology, et al., 114 S.Ct. 1900, 1909 (1984) (applying Chevron* deference only to EPA's *regulations* implementing § 401); *Arkansas v. Louisiana*, 112 S.Ct. 1046, 1060 (1992) (applying *Chevron* deference only to EPA adjudication).

[24] *See Oconto Falls, Wisconsin v. Federal Energy Regulatory Commission*, 41 F.3d 671, 674 (D.C. Cir. 1994) (FERC determination that "orphaned" hydropower project proceedings were not "original" license proceedings under Federal Power Act (FPA) section 7(a), but were instead relicensing proceedings governed by FPA section 15, entitled to *Chevron* deference).

requirements is a change in "the terms of operation of the dam in North Carolina."[25]

In view of the EPA's reliance on *PUD No. 1 of Jefferson County*, *supra*, however, a fuller analysis of that decision is warranted. The Supreme Court did not deal with the question of what activity gives rise to a discharge so as to trigger the certification requirement of section 401(a)(1); all parties agreed that the section applied. Rather, the Court held that, once the certification requirement of section 401(a)(1) is triggered by a discharge for which a federal permit or license is required, then the certification conditions are not limited to addressing merely the physical quality of the water, but can also require implementation of state water quality standards under the more expansive language of section 401(d), whose scope is broad enough to encompass water flows.

We reject, moreover, the EPA's assertion[26] that the principles of *PUD No. 1* are controlling here; in truth, the facts of this case are dispositively different from the facts in *PUD No. 1*. In *PUD No. 1*, there was no hydropower project in existence at the time the state asserted § 401 authority over the operation of the entire project. It was uncontested that the activity that would need a federal license in *PUD No. 1* -- operation of the hydropower project -- would result in at least two discharges, originating in the certifying state (one associated with construction, and the other at the tailrace after electricity had been generated). The existence of these discharges was critical to the Supreme Court's determination that the state could regulate the flows resulting from the licensed activities.[27] Here, in contrast, the critical questions in dispute are entirely different -- namely, whether there is a discharge, and, if so, what activity gave rise to it, and where the activity takes place.

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[25] Letter at p. 5.

[26] Letter at p. 4.

[27] 114 S. Ct. at 1908-09 ("[s]ection 401(a)(1) identifies the categories of activities subject to certification--namely with discharges").

Thus, unlike *PUD No. 1*, the "activity" involved in the license amendment process here is not the operation of the hydropower project. To the contrary, the "activity" of operating the project has already been licensed. Indeed, the only activity that necessitates a license amendment here, construction of the water supply facilities and the withdrawal of water, occurs entirely in Virginia, and that activity has already been certified by Virginia. In short, it was the presence of two discharges in the certifying state in *PUD No. 1*, and the absence of any discharges originating in North Carolina in this case, that distinguishes the State of Washington's authority to certify the reduction in flows in *PUD No. 1* from North Carolina's lack of authority to do so here.

However, even if the word "discharge" is ultimately determined to be broad enough to include the removal of water from the water, we determine, as an alternative basis for decision, that the activity involved in enabling such removal occurs entirely in (*i.e.*, for CWA purposes "originates" in) Virginia, and not in North Carolina. The clear language of section 401(a)(1), as quoted above, provides that the requirement for CWA certification is triggered by an "activity," and that the certification is to be obtained from the state in which that "activity" occurs, *i.e.*, the state in which the resulting "discharge" will originate". The activity we authorized and approved in the amendment to the license occurs in Virginia, and that is the state in which the discharge originates; none of that activity occurs in North Carolina. In this respect, it is important to distinguish the amendment herein from proceedings leading to the issuance of a license.

In a proceeding in which the Commission issues an original license to construct and operate a new hydroelectric project, the "activity" is the construction of the project facilities and operation of the project. The "discharge" from the construction of the facilities includes the dirt, gravel, waste, *etc.*, that falls or is placed into the river during the course of construction, and the "discharge" from the operation of the

project is the water that leaves the project as it flows over or through a dam, or through penstocks, powerhouse turbines and tailraces, and reenters the river or enters some other waterway.

In a proceeding for a new license (relicense) of the project after the original license has expired, if no new facilities are proposed to be constructed, then the "activity" requiring certification is the continued operation of the project. The place of discharge is the place at which the project waters leave the project impoundment or bypass facilities and reenter the river or other waterway.

In both original licensing and relicensing, the construction and/or the operation of the project results in the deposit of something -- dirt, water or other potential substances -- from the project to a waterway. That is the "discharge" from the project, and it "originates" at the place where the dirt falls into the water and where the water flows from the project into the river. Section 401(a)(1) requires certification from the state in which the activity occurs.

In the case before us, however, Virginia Power already has a valid license to operate the project, and did not seek or receive any renewed authority to do so. The new "activity" for which Virginia Power, on behalf of Virginia Beach, sought and received authority from the Commission is the construction and operation of water withdrawal facilities within the Project No. 2009 boundary. That activity -- including the removal of water -- will originate entirely in Virginia, and the only "discharges" associated with that activity -- the deposition in the water of dirt and other construction debris -- will also originate entirely in Virginia.[28]

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[28] As noted, the Commission amended Virginia Power's license for the Gaston and Roanoke Rapids Project in order to accommodate Virginia Beach's non-project use of project lands and waters. These facilities will have no role in the generation of electricity or any other licensed project purpose. In analyzing such requests, the Commission examines under NEPA the proposed activity's potential environmental impacts, and reasonable alternatives to the

The EPA misconstrues the nature of the Commission's authorization in this proceeding. The Commission did not authorize any physical change to the facilities located in North Carolina, nor did the Commission make any changes in the license's minimum flow requirements from those facilities. And although Virginia Power will be able to generate less electricity at Lake Gaston after Virginia Beach's water supply project is implemented, Virginia Power's existing license does not impose a requirement to generate a particular amount of electricity. Both of the project's dams will continue to operate within the parameters of the license. No amendment to the license was required with respect to maintaining minimum flows in the river or a minimum level in the reservoir, nor with respect to minimum releases from either of the dams, nor any other aspect of the operation of the dams. In short, the amendment of the license did not entail any activity that occurs in North Carolina.

The amount of electric power generated in a given year is roughly proportional to the amount of water that is passed downstream through the project's turbines,[29] which is in itself a function of rainfall, flood control decisions, flows to protect fishery resources, and minimum releases to protect water quality, *etc.* Virginia Power's license authorizes a wide range of

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(Footnote Continued)

proposed activity. This informs the Commission's determination of whether the non-project use can be granted as consistent with the public interest standard of section 10(a)(1) of the Federal Power Act, which governs (and governs only) use of the licensed project's lands and waters. These analyses were conducted with respect to the potential environmental impacts of the one-percent diminution of water leaving Lake Gaston, and the proposed construction of the water withdrawal facilities.

[29] The correlation between river flow and electric generation is not entirely linear because both head and unit efficiency vary with the volume of the flow, and there is also a potential for spillage over one of the dams depending on the rate of the water releases from Kerr Reservoir.

river flows[30] and prescribes neither a minimum nor maximum amount of electricity to be generated. A review of the Commission's records indicates that the electric power generated by the project over the past ten years has ranged very widely, from 333,980 megawatt hours (MWh) (in 1986) to 963,805 MWh (in 1989) -- a variation from year to year of almost 300 percent.[31] The Virginia Beach water supply project, on the other hand, will reduce the flow of the river downstream of the project by only one percent (approximately) of what it would otherwise have been, with an approximate average annual loss of 7,930 MWh of electric generation (about 1.1 percent). In other words, the natural variation in the flow of the river from year to year vastly exceeds the variation induced by the

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[30] *See* pp. 2-9 to 2-16 of Exhibit A of the RRBA's filing for a detailed description of how the project is operated.

[31] Virginia Electric and Power Company.

Gaston and Roanoke Rapids Project No. 2009.

Historical Net Generation Exclusive of Station Use.

Year	*Roanoke Rapids Development MWh*	*Gaston Development MWh*	*Total MWh*
1986	164,347	168,633	333,908
1987	457,656	506,149	963,805
1988	197,260	184,228	381,488
1989	462,317	463,630	925,947
1990	449,237	447,281	896,518
1991	314,281	326,901	641,182
1992	310,865	301,230	612,095
1993	380,643	451,691	832,334
1994	328,520	356,024	684,544
1995	320,071	326,437	646,508

Source: FERC Form No. 1

water supply project. Those wide variations are encompassed within the authorization of Virginia Power's existing license.

Because the statutory scheme of the Clean Water Act limits the certification requirement of section 401(a)(1) to the state in which the federally authorized activity discharge will originate -- here, Virginia, which issued certification in 1983 -- no section 401(a)(1) certification is required from North Carolina, a potentially affected other state.[32] Such a state's remedy is under section 401(a)(2) of the Clean Water Act,[33] which provides, in pertinent part, that whenever the Administrator of the EPA determines that a discharge "*may affect* . . . the quality of the waters of *any other State*," that "other State" may object to the federal permit and require a public hearing.[34] The permitting agency then must either

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[32] *See, e.g.*, EPA's publication entitled Wetlands and 401 Certification, Opportunities and Guidelines for States and Eligible Indian Tribes (EPA 843-B-89-100, April 1989), at p. 8: "States may grant or deny 'certification' for a federally permitted or licensed activity that may result in a discharge to the waters of the United States, if it is in the State where the discharge will originate"; *see also* p. 22, which discusses the procedural remedies available to other affected states.

[33] *See National Wildlife Federation v. FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990) (section 401 certification not required from upstream state that will incur soil erosion caused by dam in downstream state); *Lake Erie Alliance v. U.S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074-75 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983) (discharge from Ohio steel mill on border of Pennsylvania originates in Ohio; CWA section 401 certification from Pennsylvania not required despite effect on Pennsylvania's waters).

[34] Emphasis added. Section 401(a)(2), 33 U.S.C. § 1341(a)(2), provides as follows:

> Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification.

"condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements" or deny the permit.

In 1983, in the context of the Corps' review for a dredge and fill permit, North Carolina followed exactly this procedure and asked the EPA to require a section 401(a)(2) hearing for the Virginia Beach water supply project. The EPA did not grant North Carolina's request.[35] In sum, North Carolina

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(Footnote Continued)

> Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and. the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

[35] *See* Comments of the State of North Carolina on Water Quality Effects of

followed the proper procedure under section 401(a)(2). Its request was denied. EPA cannot now come in to this proceeding, 13 years later, and seek to undo its prior determination. In our view, North Carolina's status as an affected advisory state has not changed simply because the water supply project is being reviewed by a different agency. The proposal the Corps of Engineers approved is the very same Virginia Beach water supply project that we authorized.

Pursuant to the terms of CWA section 401(a)(3), water quality certification issued by the relevant state in conjunction with a federal agency's license or permit "with respect to the construction of any facility shall fulfill," absent a change in circumstances,[36] the certification requirements "in connection

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(Footnote Continued)

Proposed Lake Gaston Water Supply Diversion Project Under Permit Consideration by the Army Corps of Engineers, attached to letter to Mr. Charles R. Jeter, Regional Administrator, U.S. Environmental Protection Agency, Atlanta, Georgia, from Hon. James B. Hunt, Jr., Governor, State of North Carolina (December 29, 1983); letter from Mr. Jeter to Mr. James A. Summers, North Carolina Department of Natural Resources and Community Development, Raleigh, North Carolina (April 6, 1984).

In this case, for all the reasons detailed in the FEIS and our orders, the impact on the Roanoke river downstream of Lake Gaston is insubstantial, reducing average flows in the river by about one percent. But even if the Virginia Beach water supply project had proposed to reduce flows much more substantially (which it did not), it would not change our view of whether a discharge resulted and, if so, where it would originate for purposes of section 401. However, that very different proposal would still need to pass muster as reasoned decision-making under the balancing provisions of section 10(a)(1) of the Federal Power Act and would need to be supported by substantial evidence. Moreover, North Carolina, as the affected state, could also pursue its remedies under section 401(a)(2) based on that very different set of facts.

[36] *See Keating v. Federal Energy Regulatory Commission*, 927 F.2d 616 (D.C. Cir. 1991). In the instant proceeding, there has been no notice or allegation

with any other Federal license or permit required for the operation of such facility."[37] As noted, in 1983 the State of Virginia issued section 401(a)(1) water quality certification for the dredge and fill permit subsequently issued by the Corps for Virginia Beach's water supply project.

The Commission firmly rejects the EPA's broad assertion that ***any*** amendment to a license triggers a requirement for CWA section 401(a)(1) certification even absent any nexus at all

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(Footnote Continued)

of a change of circumstance under section 401(a)(3) subsequent to Virginia's issuance of its 1983 water quality certification in connection with the Corps of Engineers dredge and fill permit.

[37] 33 U.S.C. § 1341(a)(3) states:

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the water into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

between the amendment and water quality. The Commission frequently has occasion to amend hydropower project licenses to reflect land-based changes in projects' recreation plans (*e.g.*, management of park lands or picnic areas, *etc.*), roads, or electric transmission lines that may be miles away from the river and have no relationship whatever to water or water quality. Amendments that have no impact on, or nexus to, water quality at the site of the project cannot be construed to confer unfettered CWA conditioning and veto power on the state in which the park, road or transmission line might be located, and least of all on the state in which the water is located even though it may not be the state in which the park, road, or transmission line is located.

The EPA asserts[38] that "even if there were no change to the licensed activity," section 401 certification by North Carolina is still required because section 401 applies to licensing of any activity, including an ongoing activity that may result in a discharge. We conclude that it is the activity for which the applicant seeks a federal license (or license amendment), not some previously licensed "ongoing activity," that must be the activity requiring a certification from the state in which the discharge will originate.

Further, in seeking to withdraw water from Lake Gaston, Virginia is allocating the use of water within its borders. We believe it clear that Congress did not intend the CWA to be used as a means of allocating water between and among different states or other entities or claimants. Section 101(g) of the CWA provides:[39]

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[38] Letter at p. 5.

[39] 33 U.S.C. § 1251(g). *See also PUD No. 1 of Jefferson County et al. v. Washington Department of Ecology et al., supra*, 114 S. Ct. at 1913, quoting from the legislative history of section 101(g): "It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations."

(g) *Authority of States over water*

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

North Carolina's argument that a diminished flow, without more, triggers the requirements of CWA section 401(a)(1) is, at bottom, an argument that North Carolina can control *any* alteration in the amount of water it receives from an upstream state, any time a federal permit happens to be needed in conjunction with such alteration.[40] We do not believe that Congress intended the CWA to be used by a downstream state as a device to frustrate the ability of an upstream state to allocate in-state water to meet public consumptive needs within that upstream state.[41]

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[40] We discern no difference between a state's right to, *e.g.*, increase the withdrawal of water from a river within its boundaries through the use of existing facilities located upstream of a FERC-licensed reservoir, and the state's right to withdraw more water from the same river by obtaining appropriate federal agency authorizations to build a new water withdrawal facilities at the FERC-licensed reservoir.

[41] Virginia Beach (memorandum at p. 16, n.6) and the Deputy Attorney General of Virginia (letter at p. 1) cite an enactment of the Virginia General Assembly (1992 Va. Acts, Ch. 812) as constituting an allocation of 60 mgd of water from the Roanoke River at Lake Gaston for itself and its neighboring communities. The EPA, in its letter, did not address section 101(g) of the CWA nor the use of section 401 to allocate (or block the allocation of) water between and among states.

Accordingly, for all of the above reasons, we determine that the activities we authorized in our orders of July 26 and September 22, 1995, in the above-captioned proceeding do not involve a "discharge" in the State of North Carolina within the meaning of section 401(a)(1) of the CWA, because the discharge originates in the State of Virginia and not in the State of North Carolina.

B. ***Virginia Beach's Rights to Mitigation Flows***

Subject to a grant of leave by the Court, we will take this occasion to clarify the record with respect to another matter that was raised during oral argument before the Court.

The RRBA has asserted on several occasions that Virginia Beach's legal right to request the Corps of Engineers to release water it has stored in Kerr Reservoir is subordinate to the rights of Virginia Power and its affiliate, Carolina Power & Light Co., with respect that water [sic]. Pursuant to a contract dated January 13, 1984, Virginia Beach purchased the right to use an estimated 10,200 acre-feet of storage space in Kerr Reservoir between elevations 268 and 300 above mean sea level. The RRBA cites a passage in a September 24, 1986 "memorandum for record" from Max Grimes, "Chief H&H Branch" of the Engineering Division of the Wilmington, North Carolina office of the Corps, as support for its contention that Virginia Beach's contractual right to the Kerr Reservoir water is subordinate to water rights held by Virginia Power and Carolina Power & Light.[42] The memorandum refers to "ongoing litigation" involving the Corps, Virginia Beach, and the latter's water supply contract, and was apparently drafted prior to the resolution of that litigation.

We find the RRBA's concerns about a potential risk that Virginia Power (or its affiliate) would seek to enforce the alleged contractual priority to the stored water to be completely unfounded. By accepting the authorization and amendment to its license, Virginia Power has obligated itself to refrain from

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[42] *See* FEIS, appendix at p. E-250.

taking any action that would be inconsistent with the conditions of the license or that would undermine the predicates upon which the license was issued. *See* Article 47 of the license,[43] which requires Virginia Power to file a plan for Commission approval showing how the storage volume in Kerr Reservoir will be used to augment flows in the Roanoke River below the project dams during the striped bass spawning period and during low flow conditions.[44] The Corps of Engineers' dredge and fill permit imposed a comparable requirement on Virginia Power.[45]

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[43] 72 FERC at p. 61,400-01. Article 47 was originally numbered 46 and was renumbered as 47 in the August 23, 1995 Errata.

[44] The EPA (letter at p. 5) notes that "the Commission amended the license to add a provision to ensure the mitigation of downstream impacts [on] fishery resources due to the proposed withdrawal." As discussed above, however, that amendment does not constitute an "activity" in North Carolina from which a "discharge" "originates" because the amendment did not make any change in the minimum flows or any other aspect of the operation of the two project dams in North Carolina.

[45] *See North Carolina v. Hudson*, 731 F. Supp. 1261, 1265-66 (E.D.N.C. 1990). In 1987, a year after the Grimes memorandum, the Corps found "it appropriate to amend the City's permit to require as a condition that they *must* allow the Wilmington District, Corps of Engineers to utilize [for the protection of striped bass spawning] the storage which the City has purchased in Kerr Reservoir" (emphasis in the original). *See also Roanoke River Basin Ass'n v. v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991): "The Corps' decision to make the mitigation condition mandatory means that the modified permit protects the appellants' interests (and the striped bass) more completely."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1494 **September Term, 1996**

State of North Carolina, [Filed Aug. 21, 1997]

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

The City of Virginia Beach, Virginia,

Intervenor

Consolidated with 95-1500

BEFORE: Wald, Silberman and Sentelle, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing filed by the State of North Carolina and the Roanoke River Basin Association, and of the responses thereto, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the petitions.

UNITED STATES COURT OF APPEALS
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State of North Carolina, [Filed Aug. 21, 1997]

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

The City of Virginia Beach, Virginia,

Intervenor

Consolidated with 95-1500

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

The Suggestions For Rehearing In Banc of the State of North Carolina and the Roanoke River Basin Association and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED that the suggestions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Wald and Tatel would grant the suggestions.

Circuit Judge Randolph did not participate in this matter.

16 U.S.C. § 797

General powers of Commission

The Commission is authorized and empowered--

* * * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: ***Provided***, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: ***Provided further***, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the

contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: ***Provided further***, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: ***And provided further***, that upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

* * * *

(June 10, 1920, c. 285, § 4, 41 Stat. 1065; June 23, 1930, c.572, § 2, 46 Stat. 798; Aug. 26, 1935, c. 687, Title II, § 202, 49 Stat. 839; Dec. 21, 1982, Pub.L. 97-375, Title II, § 12, 96 Stat. 1826.)

(As amended Oct. 16, 1986, Pub.L. 99-495, § 3(a), 100 Stat. 1243.)

33 U.S.C. § 1251 -- Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency

(hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 5(a), 26(b), 91 Stat. 1567, 1575.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 316(b), 101 Stat. 60.)

33 U.S.C. § 1311 -- Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not

referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection

established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or

biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that--

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment,

acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollutants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph--

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that--

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such

monitoring is limited to include only those scientific investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial

mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purposes of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsection shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the

Spreceding sentence shall apply without regard to the presence or absence of a causal relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b)(1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, section 1317 of this title, and such interim effluent limitations applicable to that

treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and--

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which

shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of--

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later that[1] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987, and except as provided in paragraph (5);

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than 270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate

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[1] So in original. Probably should be "than".

security to assure timely compliance with the requirements from which a modification is sought.

(3) Compliance requirements under subsection (g)

(A) Effect of filing

An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) Effect of disapproval

Disapproval of an application for a modification under subsection (g) of this section shall not stay the requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) Deadline for subsection (g) decision

An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such applicaton must be approved or disapproved not later than 365 days ater the date of approval of such petition.

(5) Extension of application deadline

(A) In general

In the 180-day period beginning on October 31, 1994, the city of San Diego, California, may apply for a modificaton pursuant to subsection (h) of this section of the requirement of subsection (b)(1)(B) of this section with respect to biological

oxygen demand and total suspended solids in the effluent discharged into marine waters.

(B) Application

An application under this paragraph shall include a commitment by the applicant to implement a waste water reclamation program that, at a minimum, will--

(i) achieve a system capacity of 45,000,000 gallons of reclaimed waste water per day by January 1, 2010; and

(ii) result in a reduction in the quantity of suspended solids discharged by the applicant into the marine environment during the period of the modification.

(C) Additional conditions

The Administrator may not grant a modification pursuant to an application submitted under this paragraph unless the Administrator determines that such modification will result in removal of not less than 58 percent of the biological oxygen demand (on an annual average) and not less than 80 percent of total suspended solids (on a monthly average) in the discharge to which the application applies.

(D) Preliminary decision deadline

The Administrator shall announce a preliminary decision on an application submitted under this paragraph not later than 1 year after the date the application is submitted.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves

toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(*I*) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the

territorial seas, if the applicant demonstrates and the Administrator finds that--

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsections (b)(1)(A) and (b)(2)(E) of this section and section 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractural obligation to use funds in the amount required (but not less than $250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: ***Provided***, That if the

effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that--

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314(g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application--

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

By January 1, 1997, and January 1 of every odd-numbered year thereafter, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under this section or section 1314 of this title or any national categorical pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(*o*) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the

Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection--

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987, at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

(June 30, 1948, c. 758, Title III, § 301, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 42-47, 53(c), 91 Stat. 1582-1586, 1590; Dec. 29, 1981, Pub.L. 97-117, §§ 21, 22(a)-(d), 95 Stat. 1631, 1632; Jan. 8, 1983, Pub.L. 97-440, 96 Stat. 2289.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, §§ 301(a) to (e), 302(a) to (d), 303(a), (b)(1), (c) to (f), 304(a), 305, 306(a), (b), 307, 101 Stat. 29-37; Nov. 18, 1988, Pub.L. 00-688, Title III, § 3202(b), 102 Stat. 4154; Oct. 31, 1994, Pub.L. 103-431, § 2, 108 Stat. 4396; Dec. 21, 1995, Pub.L. 104-66, Title II, § 2021(b), 109 Stat. 727.)

33 U.S.C. § 1312 -- Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(l) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the

benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this section toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

(June 30, 1948, c. 758, Title III, § 302, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 846.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 308(e), 101 Stat. 39.)

33 U.S.C. § 1313 -- Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such

proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standard; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic

pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and

propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those

pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

(June 30, 1948, c. 758, Title III, § 303, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 846.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 308(d), Title IV, § 404(b), 101 Stat. 39, 68.)

33 U.S.C. § 1316 -- National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter

shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;

paperboard, builders paper and board mills;

meat product and rendering processing;

dairy product processing;

grain mills;

canned and preserved fruits and vegetables processing;

canned and preserved seafood processing;

sugar processing;

textile mills;

cement manufacturing;

feedlots;

electroplating;

organic chemicals manufacturing;

inorganic chemicals manufacturing;

plastic and synthetic materials manufacturing;

soap and detergent manufacturing;

fertilizer manufacturing;

petroleum refining;

iron and steel manufacturing;

nonferrous metals manufacturing;

phosphate manufacturing;

steam electric powerplants;

ferroalloy manufacturing;

leather tanning and finishing;

glass and asbestos manufacturing;

rubber processing; and

timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State.

If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(June 30, 1948, c. 758, Title III, § 306, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 854.)

33 U.S.C. § 1317 -- Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources,

shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of

Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) Pretreatment standards; hearing; promulgation; compliance period; revision; application to State and local laws

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) New sources of pollutants into publicly owned treatment works

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

(e) Compliance date extension for innovative pretreatment systems

In the case of any existing facility that proposes to comply with the pretreatment standards of subsection (b) of this section by applying an innovative system that meets the requirements of section 1311(k) of this title, the owner or operator of the publicly owned treatment works receiving the treated effluent from such facility may extend the date for compliance with the applicable pretreatment standard established under this section for a period not to exceed 2 years--

(1) if the Administrator determines that the innovative system has the potential for industrywide application, and

(2) if the Administrator (or the State in consultation with the Administrator, in any case in which the State has a pretreatment program approved by the Administrator)--

(A) determines that the proposed extension will not cause the publicly owned treatment works to be in violation of its permit under section 1342 of this title or of section 1345 of this title or to contribute to such a violation, and

(B) concurs with the proposed extension.

(June 30, 1948, c. 758, Title III, § 307, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 856, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 53(a), (b), 54(a), 91 Stat. 1589-1591.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 309(a), 101 Stat. 41.)

33 U.S.C. § 1341 -- Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if

certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the

case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent

limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this

section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, c. 758, Title IV, § 401, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 877, and amended Dec. 27, 1977, Pub.L. 95-217, §§ 61(b), 64, 91 Stat. 1598, 1599.)

33 U.S.C. § 1362 -- Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste

discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any

pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D--Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(June 30, 1948, c. 758, Title V, § 502, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 886, and amended Dec. 27, 1977, Pub.L. 95-217, § 33(b), 91 Stat. 1577.)

(As amended Feb. 4, 1987, Pub.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, Pub.L. 100-688, Title III, § 3202(a), 102 Stat. 4154; Feb. 10, 1996, Pub.L. 104-106, Div. A, Title III, § 325(c)(3), 110 Stat. 259.)

18 C.F.R. § 4.38 -- Consultation requirements.

* * * *

(f) ***Application requirements documenting consultation and any disagreements with resource agencies.*** An applicant must show in Exhibit E of its application that it has met the requirements of paragraphs (b) through (d) and paragraphs (g) and (h) of this section, and must include a summary of the consultation process and:

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

(2) Any letters from the public containing comments and recommendations;

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

(i) The need for a study or the manner in which a study should be conducted and the applicant's reasons for disagreement, and

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe;

(4) Evidence of any waivers under paragraph (e) of this section;

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in § 2.19 of this chapter and a description of any relevant resource agency or Indian tribe

determination regarding the consistency of the project with any such comprehensive plan;

(7)(i) With regard to certification requirements for a license applicant under section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act):

(A) A copy of the water quality certification;

(B) A copy of the request for certification, including proof of the date on which the certifying agency received the request; or

(C) Evidence of waiver of water quality certification as described in paragraph (f)(7)(ii) of this section.

(ii) A certifying agency is deemed to have waived the certification requirements of section 401(a)(1) of the Clean Water Act if the certifying agency has not denied or granted certification by one year after the date the certifying agency received a written request for certification. If a certifying agency denies certification, the applicant must file a copy of the denial within 30 days after the applicant received it.

(iii) Notwithstanding any other provision in title 18, chapter I, subpart B, any application to amend an existing license, and any amendment to a pending application for a license, requires a new request for water quality certification pursuant to paragraph (f)(7)(i) of this section if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project.

(8) A description of how the applicant's proposal addresses the significant resource issues raised at the joint meeting held pursuant to paragraph (b)(2) of this section; and

(9) A list containing the name and address of every federal, state, and interstate resource agency and Indian tribe with which the applicant consulted pursuant to paragraph (a)(1) of this section.

* * * *

[Order 533, 56 FR 23153, May 20, 1991, as amended at 56 FR 61155, Dec. 2, 1991]

THIS PETITION IS SCHEDULED FOR ORAL ARGUMENT ON FEBRUARY 4, 1997 AT 2:00 P.M.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-1494 (lead case)
95-1500 (consolidated)

STATE OF NORTH CAROLINA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION TO REVIEW ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF AMICI CURIAE STATES OF VERMONT, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, OKLAHOMA, TEXAS, AND WYOMING

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, the Amici States certify the following:

A. Parties, Intervenors, and Amici

Except for the Amici States here, all parties, intervenors and amici appearing before the agency and in this Court are listed in the Briefs for Petitioners, Respondent, and Amicus Commonwealth of Virginia.

B. Rulings Under Review

References to the rulings at issue appear in the Briefs for Petitioners and Respondent.

C. Related Cases

This case has not been reviewed previously by this Court.

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PUD No. 1 v. Washington Dep't of Ecol., 511 U.S. 700, 114 S. Ct. 1900 (1994) ..... *passim*

Potomac Edison Co., 30 FERC ¶ 61,078 (1985) 5

Statutes:

33 U.S.C. § 1251 ..... 2, 7

33 U.S.C. § 1341(a)(1) ..... *passim*

Miscellaneous:

Letter from R. Perciasepe (Asst. Adm'r for Water, EPA) & J.Z. Cannon (General Counsel, EPA) to L.D. Cashell (Sec'y, FERC) of Oct. 24, 1996. 7

GLOSSARY

"EPA" refers to the Environmental Protection Agency.

"FERC" refers to the Federal Energy Regulatory Commission.

"Lake Gaston project" refers to the project works which Virginia Power operates on the Roanoke River under license from FERC, including the hydroelectric dam and associated reservoir known as Lake Gaston.

"License Amendment" and "Order" refer to FERC's July 26, 1995 Order Approving Non-Project Use of Project Lands and Waters and Amending License.

"Orders" refers collectively to the Order and the Rehearing Order.

INTEREST OF THE AMICI CURIAE STATES

The amici States are the primary stewards of the waters within their borders and maintain water quality protection programs under various state and federal statutes, including the Federal Water Pollution Control Act (Clean Water Act or CWA). In particular, each State exercises authority under section 401 of the CWA to ensure that federally licensed projects comply with state water quality laws even if those laws are more stringent than analogous federal regulations. FERC's cavalier disregard of the rights of North Carolina and its peremptory rejection of the recommendations of EPA represent a clear and present danger to the sovereign rights of all states because FERC -- in this and other hydroelectric power cases -- has arrogated authority that Congress has expressly conferred upon the several states.

SUMMARY OF ARGUMENT

The goals and policies of the Clean Water Act and the express language of section 401 support a construction of section 401(a)(1) in favor of the States. Section 401(a)(1) applies to license amendments and renewals as well as initial licenses; permits a state to review any discharge originating in that state regardless of the magnitude of the discharge; and requires, where an activity results in multiple discharges in multiple states, a certification from each state in which a discharge originates.

The very nature of hydroelectric facilities assures that at least one discharge will originate in the state where the dam is located. In the present case, the license amendment approved by FERC altered the operation of a hydroelectric project, including operation of the project's dam and turbines located in North Carolina, which resulted in a new and different discharge originating in North Carolina.

ARGUMENT

I. Congress Has Designated The States To Be The Primary Stewards Of The Nation's Waters

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, Congress did not simply impose a federal program upon the states, but rather chose to support and enhance the states' traditional role as the primary governmental entities entrusted with stewardship of the waters within their borders. See 33 U.S.C. § 1251(b) (stating Congress' policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"). Congress explicitly preserved state authority "to impose and enforce water quality standards that are more stringent than those required by federal law." Keating v. FERC, 927 F.2d 616, 622, reh'g denied, 927 F.2d 616, 625 (D.C. Cir. 1991). This Court has affirmed that "[t]he states remain, under the [CWA], the 'prime bulwark in the effort to abate water pollution' . . . ." Id. (citation omitted).

II. The Purpose Of Section 401(a)(1) Is To Confer Authority Upon The States To Ensure That Federally Licensed Activities Comply With State Laws

Congress enacted section 401 to ensure that the federal government would not impede the states' water protection efforts. See Keating, 927 F.2d at 622 (Section 401 is "[o]ne of the primary mechanisms" to preserve state powers). Section 401(a)(1) forbids the federal government from issuing any license or permit to conduct any activity within the scope of section 401(a)(1) unless the state certifies that the activity will comply with state water quality laws. 33 U.S.C. § 1341(a)(1). A decision to grant or deny certification "turns on questions of substantive state environmental law -- an area that Congress

expressly intended to reserve to the states and concerning which federal agencies have little competence." 927 F.2d at 622. The federal government cannot override a state's decision not to certify an activity, and a project that lacks certification cannot be licensed. Id.

In lieu of vetoing a noncompliant federally licensed activity, section 401(d) allows a state to certify the activity with conditions. See 33 U.S.C. § 1341(d); PUD No. 1 v. Washington Dep't of Ecol., 511 U.S. 700, ___, 114 S. Ct. 1900, 1908-14 (1994). The federal licensing agency must incorporate into the federal license any conditions specified by the state. 33 U.S.C. § 1341(d).

Congress' grant to the states of the authority to veto or condition any federal license or permit demonstrates Congress' intent to tip the balance of power decidedly in favor of the states. Consistent with this intent, this Court should protect the dominant state role from encroachment by prohibiting FERC from precluding state review under section 401(a)(1).

III. The Express Language Of Section 401(a)(1) Requires That The Statute Be Construed Broadly In Favor Of The States

Section 401(a)(1) establishes the prerequisites for state certification rights under section 401. 33 U.S.C. § 1341(a)(1). Written in sweeping terms, the section applies to "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge . . . ." Id. (emphases added). The inclusive nature of such words and phrases as "any" and "but not limited to" is self-evident and admits of no limitations. See PUD No. 1, 114 S. Ct. at 1914 ("we are unwilling to read implied limitations into § 401").

Section 401(a)(1) vests authority with the states over any activity that "may" result in a discharge. Congress could have

limited jurisdiction to activities that "will" or "may likely" result in a discharge, but chose not to do so. At every turn, Congress used language in section 401(a)(1) to favor the states' rights and gave no indication that any federal entity may limit a state's right to certify a federally licensed activity.

IV. Section 401 Applies To License Amendments, Discharges Of Any Magnitude, And Each Discharge Of Multiple Discharges

Section 401(a)(1) applies to license amendments and renewals as well as initial licenses. See Potomac Edison Co., 30 FERC ¶ 61,078 (1985). To conclude otherwise would allow FERC to undermine the very purpose of section 401(a)(1) by permitting a licensee to obtain through an amendment what it otherwise would be prohibited from achieving in an initial license, i.e., avoidance of state review.[1] Section 401(a)(1) also grants certification authority to each state in which a discharge originates. For projects with multiple discharges in multiple states, an applicant is required to seek certification from more than one state. Iroquois Gas Trans'n Sys., 53 FERC ¶ 61,194 (1990), aff'd, Louisiana Ass'n of Indep. Prod. and Royalty Owners, 958 F.2d 1101 (D.C. Cir. 1992).

---

[1] Section 401(a)(1) applies regardless of whether a federal agency has determined that a discharge is material. Assessing the impact of a discharge on water quality is a determination Congress has reserved expressly to the states. FERC's judgment that a discharge is not material is irrelevant because Congress authorized states to impose more stringent safeguards than the federal government may consider necessary; and FERC concededly has no expertise with respect to assessing the impact on water quality of a discharge. See Keating, 927 F.2d at 622.

V. The State In Which A Hydroelectric Dam Is Located Has Section 401(a)(1) Certification Rights With Respect To A License Amendment Which Alters The Discharge At The Dam

The operation of hydroelectric facilities always will result in a discharge from the dam site; therefore, the state in which the dam is located has authority to certify the discharge under section 401(a)(1). See, e.g., PUD No. 1, 114 S. Ct. at 1908. Hydroelectric facilities divert water to the turbines used to generate electricity. Upon exiting the turbines, the water is reunited with the main waters of the river. At the Lake Gaston project, the turbines are located at the dam. This discharge through the turbines triggers section 401(a)(1) rights in North Carolina, the state in which the dam and turbines are located. The FERC Orders belie FERC's attempt to characterize the activity authorized by the amended license as other than the modified operation of the Lake Gaston project and dam.

Any alteration of, addition to, or reduction of the discharge at the Lake Gaston project dam resulting from the activities licensed by the license amendment similarly triggers section 401(a)(1) rights in North Carolina because the revised discharge is a new and different discharge. To conclude otherwise would require concluding that the existence of section 401 rights depends upon the form of the licensing action, a distinction not made in section 401.

EPA explicitly supports the right of North Carolina to review under section 401(a)(1) the proposed alteration of the discharge at the Lake Gaston project. (Letter from R. Perciasepe (Asst. Adm'r for Water, EPA) & J.Z. Cannon (General Counsel, EPA) to L.D. Cashell (Sec'y, FERC) of Oct. 24, 1996.) Congress authorized EPA, not FERC, to administer and enforce the CWA, 33 U.S.C. § 1251(d), and EPA has expertise in this highly technical field. See PUD No. 1, 114 S. Ct. at 1909. Since EPA's view "is a reasonable

interpretation of § 401, [it] . . . is entitled to deference." Id. (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

Conversely, FERC has no expertise or authority to administer or enforce the CWA. The Supreme Court's discussion in PUD No. 1 of the broad concept of pollution embodied in the CWA and applied through section 401 further demonstrates FERC's total misapprehension of water quality issues and bias against the states and EPA. In upholding state section 401 authority to regulate the flow of water at a FERC-licensed hydroelectric project, the Court rejected the argument that a state cannot regulate stream flow under section 401. 114 S. Ct. at 1912-13. The Court found that the CWA itself recognizes "that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution." Id. at 1913. The Court observed that the CWA recognizes that water pollution may result from changes in water movement, flow or circulation caused by dams. Id. By denying North Carolina section 401(a)(1) rights, FERC has prevented a state from ensuring that the altered flow at a dam site located within its borders complies with state water quality laws.

CONCLUSION

For the foregoing reasons, the amici States support the position of Petitioners and urge the court to vacate the FERC

Orders for failure of the licensee to secure section 401(a)(1) certification from North Carolina.

December 9, 1996 Respectfully submitted,

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ADDENDUM OF STATUTES AND REGULATIONS

Except for the following statutory sections, all applicable statutes, regulations, etc., are contained in the Briefs for Petitioners:

Clean Water Act, Section 101, 33 U.S.C. § 1251 (a) & (d)

> **§ 1251. Congressional declaration of goals and policy**
>
> **(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective**
>
> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter -
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
>
> (4) it is the national policy that Federal financial assistance be provided to

construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

THIS PETITION IS SCHEDULED FOR
ORAL ARGUMENT ON
FEBRUARY 4, 1997 AT 2:00 P.M.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The State of North Carolina,	)	
Petitioner,	)	
v.	)	Nos.: 95-1494 (lead case)
	)	95-1500 (consolidated)
Federal Energy Regulatory Commission,	)	
Respondent.	)	

ADDENDUM TO BRIEF OF AMICI CURIAE STATES OF VERMONT, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, OKLAHOMA, TEXAS, AND WYOMING

The twenty-six Amici Curiae States hereby file, as an addendum to their Amicus brief, revised cover pages and

signature pages adding fourteen additional states as signatories. By motion filed December 13, 1996, the Amici Curiae States sought leave (1) to add as signatories to their Amicus brief the states of Georgia, Illinois, Indiana, Kentucky, Mississippi, Nevada, New York, North Dakota, Ohio, Pennsylvania, South Dakota, Utah, Washington, and West Virginia and (2) to file, as an addendum to their brief, revised cover pages and signature pages to include the additional states. The Court granted this motion by Order filed December 20, 1996.

WHEREFORE, the Amici Curiae States respectfully submit revised cover pages, attached at Tab 1, and signature pages, attached at Tab 2.

January 8, 1997

Respectfully submitted,

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[TAB NOS. 1 & 2 NOT REPRODUCED]

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-1494 (lead case)
95-1500 (consolidated)

STATE OF NORTH CAROLINA,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION TO REVIEW ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

AMICI CURIAE BRIEF IN SUPPORT OF SUGGESTION OF STATE OF NORTH CAROLINA FOR REHEARING IN BANC OF STATES OF VERMONT, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW MEXICO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, WASHINGTON, WEST VIRGINIA AND WYOMING, AND THE COMMONWEALTH OF MASSACHUSETTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, the amici States certify the following:

A. Parties, Intervenors, and Amici

All parties, intervenors and amici appearing before the agency and in this Court are listed in the Briefs for Petitioners, Respondent, Intervenor and amici.

B. Rulings Under Review

References to the rulings at issue appear in the Briefs for Petitioners and Respondent, with the exception of this Court's slip opinion State of North Carolina v. FERC, No. 95-1494 (D.C. Cir. May 9, 1997).

C. Related Cases

This case has not been reviewed previously by this Court.

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GLOSSARY

"EPA" refers to the Environmental Protection Agency.

"FERC" refers to the Federal Energy Regulatory Commission.

"Panel decision" refers to the Court's slip opinion State of North Carolina v. FERC, No. 95-1495 (D.C. Cir. May 9, 1997).

INTEREST OF AMICI

This case involves critical issues of federalism. Congress enacted the Clean Water Act ("Act") to "recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Indeed, the Courts have repeatedly found that the Act enables the States to impose more stringent standards than federal agencies as well as to veto federal licenses for projects that otherwise meet federal standards. Keating v. FERC, 927 F.2d 616, 623 (D.C. Cir. 1991); United States v. Puerto Rico, 721 F.2d 832, 838 (1st Cir. 1983) (States are "the prime bulwark in the effort to abate water pollution"). The States, as sovereign entities charged with protecting water quality, devote extensive resources to meeting this responsibility.

The panel decision allows federal agencies to license activities which violate State Water Quality Standards ("SWQS"), and precludes the States from redressing these violations. This threat to the integrity of the States' water quality programs presents issues of exceptional importance.

SUMMARY OF ARGUMENT

The panel decision unlawfully shifts to the federal government authority explicitly conferred by Congress upon the several States. It allows federally licensed facilities to add pollution to waters without regard to SWQS and thereby erode, if not wholly undermine, the States' mandate to assure that waters affected by such facilities meet SWQS.

Minimum flows are integral to compliance with SWQS and therefore are the centerpiece of virtually all § 401 certifications issued by States for hydroelectric dams. See 33 U.S.C. § 1341(a)(1). The Act defines "pollution" to mean alteration of the chemical, physical, biological, and radiological integrity of water. 33 U.S.C. § 1362(19). A reduction in the flow of water discharged from a dam affects the

integrity of water as much as the addition of a "substance" to water. The panel nonetheless concluded that an alteration in the flow of water does not trigger State § 401 certification rights because it does not add a "substance" to water. The panel decision thus eviscerates State § 401 certification rights by permitting federal licensees (but not state licensees) to violate SWQS and minimum flow requirements during the thirty to fifty year term of federal licenses for hydroelectric projects.

ARGUMENT

I. THE PANEL DECISION MISCONSTRUES THE ACT'S EXPRESS LANGUAGE AND PURPOSE

The panel decision cannot be reconciled with the Act's words and purpose, or the manner in which it has long been implemented by the States. The Act regulates "pollution." It does not regulate only "the addition of any pollutant" to water. 33 U.S.C. § 1342(a). "'[P]ollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). The Act's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "The word 'integrity' . . . refers to a condition in which the natural structure and function of the ecosystem is maintained." H.R. Rep. No. 92-911, 92nd Cong., 2d Sess. 76 (1972).

Dams are nonpoint sources of pollution. National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 578-588 (6th Cir. 1988) (dams are nonpoint sources of pollution subject to Water Quality Standards). The Act mandates that the States identify "particular nonpoint sources which **add** significant pollution" to navigable waters and control these sources to assure compliance with SWQS. 33 U.S.C. § 1329(a)(1)(B) (emphasis added). Diminution of flow affects a water's chemical, physical and biological integrity, and its use as habitat. Thus, reduction of flows through a dam adds

significant pollution to navigable waters. 33 U.S.C. § 1314(f); Public Utility Dist. No. 1 v. Washington Dep't of Ecology, 511 U.S. 700, 719 (1994); U.S.E.P.A., Nonpoint Source Guidance, Appendix B (Dec. 1987) (flow regulation listed as one of the "major nonpoint source pollution categories"). It is for this reason that States have developed SWQS that contain minimum flow requirements. For example, Vermont's standards mandate that:

> The flow of waters shall not be controlled or substantially influenced by man-made structures or devices in a manner that would result in an undue adverse impact on any existing use, beneficial [or designated] value or use or result in a level of water quality that does not comply with these rules.

Vermont Water Quality Standard § 2-02(B) (1996).

The addition of "pollution" to water may cause a violation of SWQS in precisely the same manner as the addition of "a substance or substances." Indeed, designated uses and water quality criteria cannot be met if there is insufficient water. But, because the panel concluded that a "discharge" only "contemplates the addition . . . of a substance or substances," a State will not be able to assure that the addition of pollution to waters will comply with SWQS. See State of North Carolina v. FERC, No. 95-1494, slip op. at 17 (D.C. Cir. May 9, 1997); see also 33 U.S.C. § 1362(16).

II. THE PANEL DECISION UNLAWFULLY CREATES TWO CLASSES OF PROJECTS

The panel's conclusion creates two classes of projects -- federally licensed facilities which cause pollution but nonetheless do not trigger § 401, thereby escaping regulation, and state-licensed facilities subject to the full scope of a State's implementation of the Act. The Act, of course, does not

contemplate such a dichotomy. To the contrary, the express purpose of § 401 is to subject federally licensed facilities to full compliance with the Act:

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.

116 Cong. Rec. 8,984 (1970) (Statement of CWA chief sponsor Sen. Muskie concerning § 401). This Court should not exempt federally licensed facilities from compliance with SWQS through an attenuated definition of the word "discharge." See 33 U.S.C. § 1362(16). "Discharge" must be construed to encompass changes to water flows as well as addition of substances to water because both introduce like changes to water systems, and can have equally adverse impacts on water quality and thereby constitute pollution.

III. THE PANEL DECISION COULD SEVERELY UNDERMINE STATE CERTIFICATION PROGRAMS

Minimum flow conditions are the centerpiece of § 401 certifications issued by the States for hydroelectric project dams. Without regulated minimum flows there would not be enough water to sustain designated uses such as fish habitat. Minimum flows are also requisite to meeting water quality criteria. For example, dissolved oxygen requirements are often dependent on minimum flows. As a result, no condition is more important than minimum flows to assure that dams comply with SWQS.

Under the panel decision, a license amendment that would reduce flows would not trigger § 401. Therefore, FERC

licensees could circumvent State minimum flow requirements by merely seeking amendments of licenses. The States' authority to assure that dams comply with SWQS would thereby be eviscerated.

The impact of the panel decision cannot be underestimated. FERC licenses are issued for terms of thirty to fifty years and are typically subject to numerous amendments. If amendments altering flow do not trigger § 401, then State water quality certification conditions are likely to be chipped away over the term of the license until nothing remains. The result is that federally licensed facilities will violate SWQS, and thus the Act.

IV. CONCLUSION

For the foregoing reasons, the amici States support North Carolina's Suggestion for Rehearing In Banc.

Dated: June 23, 1997

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33 U.S.C. § 1251(a), (b)

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1314(f)

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from--

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

33 U.S.C. § 1329(a)

(a) State assessment reports

(1) Contents

The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which --

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter;

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsections (h) and (i) of this section.

33 U.S.C. § 1341(a)(1)

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the

preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

33 U.S.C. § 1342(a)

(a) **Permits for discharge of pollutants**

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this

title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C. § 1362(16), (19)

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

Vermont Water Quality Standard § 2-02(B) (1996)

B. Artificial Flow Conditions

The flow of waters shall not be controlled or substantially influenced by man-made structures or devices in a manner that would result in a undue adverse effect on any existing use, beneficial value or use or result in a level of water quality that does not comply with these rules. The Secretary shall cooperate with appropriate federal, state and private interests in achieving voluntary agreements regarding the maintenance of those minimum flows or when necessary require minimum flows as provided for in 10 V.S.A. s 1003 to protect the beneficial values and uses associated with the classification of the receiving waters.

For waters whose natural flow regime is controlled by man-made structures and where there is a minimum flow agreement/requirement, compliance with the applicable water quality criteria shall be calculated on the basis of 7Q10 flow values, unless another flow value is specified in Section 3 of these rules, or the agreed/required minimum flow whichever is less.

In the absence of a minimum flow agreement/requirement, the water quality criteria shall apply at the absolute low flow resulting from flow regulation, or 7Q10, whichever is less.

Supreme Court, U.S.
FILED
JAN 21 1998
OFFICE OF THE CLERK

Nos. 97-836 and 97-839

IN THE

Supreme Court of The United States

October Term, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ROANOKE RIVER BASIN ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CITY OF VIRGINIA BEACH, VIRGINIA IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a withdrawal of water in one State, which causes a reduction in the total amount of water that flows over a downstream dam in another State, is a "discharge into the navigable waters" that originates in the downstream State within the meaning of Section 401(a)(1) of the Clean Water Act.

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State of North Carolina v. Hudson, 665 F. Supp. 428 (E.D.N.C. 1987) *(Hudson I)* 5, 9, 10

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Nos. 97-836 and 97-839

IN THE

Supreme Court of The United States

October Term, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ROANOKE RIVER BASIN ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CITY OF VIRGINIA BEACH, VIRGINIA IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The City of Virginia Beach, Virginia, intervenor below, submits this brief in opposition to petitions for writ of certiorari filed by the State of North Carolina and the Roanoke River Basin Association (RRBA), Nos. 97-836 and 97-839, respectively.

STATEMENT OF THE CASE

This case is a purely local controversy, between North Carolina and the City of Virginia Beach. It involves no federal usurpation of State powers under the Clean Water Act ("CWA"), nor any other issues of national significance. The power granted to the State by the CWA was exercised in this case by *Virginia*, which issued a § 401 certification for Virginia Beach's project because *Virginia* is the state where the project and its associated discharge are located. Nor does this case involve dam licensing or relicensing, but merely an amendment to an existing license. This is simply the latest, and hopefully the last, episode in a fifteen year crusade by North Carolina to prevent the largest city in Virginia from withdrawing drinking water from the Roanoke River in Virginia, before it can flow downstream into North Carolina. The only real issue involved here is whether North Carolina can use § 401 of the CWA to block a public water supply project located entirely in Virginia.

This case does not involve any novel or difficult questions of law, or any conflict between the circuits or with decisions of this Court. The legal question is whether Virginia Beach's water withdrawal, *in Virginia*, will "result in any discharge *into* the navigable waters" that "*originates*" in *North Carolina* within the meaning of the CWA, because it *reduces* the amount of water that flows over a downstream dam in North Carolina. The plain, clear and simple answer is no, as the Court of Appeals and FERC concluded.

The case also could have been decided on the further ground, not reached by the court or FERC, that North Carolina's claim to § 401 certification authority is barred by the doctrines of *res judicata* and collateral estoppel. The Secretary of Commerce held, in an administrative adjudication between Virginia Beach and North Carolina (which was affirmed by the United States District Court for the District of Columbia), that "*the project meets the requirements of the Clean Water Act*" and that "[t]he City has

obtained the necessary CWA federal permit and state certification." DA 1667[1] (emphasis in original).

Nature of the case

This case arises out of the construction and operation of Virginia Beach's public water supply project. The project was completed in November 1997. It begins at a water intake structure in the Pea Hill Cove arm of Lake Gaston, in Virginia. It delivers water to southeastern Virginia through a 76-mile pipeline across southern Virginia. No part of the project is located in North Carolina.

Virginia Electric and Power Company (VEPCO) and FERC are involved in this case because VEPCO owns Lake Gaston and operates it under a FERC license. Virginia Beach needed an easement from VEPCO to build and operate its intake structure in Lake Gaston. VEPCO's license required FERC's approval before it transferred any interest in its licensed project property. FERC granted VEPCO's application for that approval and amended its license to authorize construction and operation of Virginia Beach's project. The Court of Appeals denied petitions for review, in the decision challenged by the petitions for certiorari.

Construction of the City's water intake structure required discharges of dredged and fill materials into Lake Gaston, in Virginia. In 1983 and 1984, the City sought and obtained a permit from the U.S. Army Corps of Engineers (Corps) and a certification from the Virginia State Water Control Board (VSWCB), as required by §§ 404(a) and 401(a)(1) of the CWA, 33 U.S.C. §§ 1344 and 1341, respectively. It did not request a certification from North Carolina because the project would not result in the discharge of anything into the waters in North Carolina. The VSWCB certification included several conditions designed to protect water quality, including a 60 million gallons per day (mgd) cap on withdrawals. DA 27-31.

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[1] "DA" citations are to the Deferred Appendix filed in the Court of Appeals.

North Carolina did not suggest that the Corps permit required its certification under § 401(a)(1). North Carolina tried to block the Corps permit under § 401(a)(2), however, by asking EPA to determine that Virginia Beach's project might affect water quality downstream in North Carolina. Section 401(a)(2) provides that if EPA determines that a discharge which originates in one State "may affect . . . the quality of the waters of any other State," then the affected State may object to the issuance of a federal permit, which compels the licensing or permitting agency to hold a public hearing and to "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements" or deny the permit. 33 U.S.C. § 1341(a)(2). EPA refused North Carolina's request that it find that Virginia Beach's project might affect water quality in North Carolina. DA 59-66.

VEPCO filed its FERC application in 1991. In 1994, more than three years later, North Carolina contended for the first time that its § 401 certification was necessary for FERC approval of Virginia Beach's project. Section 401(a)(1) provides, in pertinent part:

> Any applicant for a Federal license or permit to conduct any *activity* including, but not limited to, the construction or operation of facilities, which may result in any *discharge into the navigable waters,* shall provide the licensing or permitting agency a certification from the State in which the discharge *originates or will originate* . . . .

33 U.S.C. § 1341(a)(1) (emphasis added).

The "activity" at issue in this case is the construction and operation of Virginia Beach's water supply project. *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997), NC App. 16-17a[2]; *Virginia Electric and Power Co.*, 77 F.E.R.C. (CCH) ¶61,138 (1996) at 61,518, NC App. 116-18a. The

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[2] The State of North Carolina's Petition and the Roanoke River Basin Association's Petition are cited as NC Pet. and RRBA Pet., respectively, and the appendix to North Carolina's Petition as NC App.

identical activity was at issue in the earlier Corps proceeding. Pursuant to § 401(a)(3), the State certification given for the Corps' construction permit also sufficed for the FERC license amendment authorizing operation of the pipeline project. *Id.* at 61, 521, NC App. at 124-25a. *See, e.g., Keating v. FERC,* 927 F.2d 616 (D.C. Cir. 1991) (State certification for Corps permit satisfied certification requirement for FERC license).

North Carolina argues that operation of Virginia Beach's project results in discharges originating in North Carolina because it slightly reduces the average (but not the minimum) amounts of water flowing over Gaston Dam in North Carolina. FERC found, to the contrary, that the *operation* of the project – the withdrawals of water from Lake Gaston – would not result in *any* discharge into navigable waters, in North Carolina or elsewhere, and therefore that North Carolina's certification was not required. 77 F.E.R.C. at 61,517, NC App. 114-15a. The Court of Appeals agreed. 112 F.3d at 1188, NC App. 18a.

FERC also held, in an additional ground for decision that the Court of Appeals did not reach, that North Carolina's certification would not be required even if Virginia Beach's withdrawals would "result in [a] discharge" by reducing water flows over downstream dams, as North Carolina argued; because any such discharge would "originate" in Virginia, where the withdrawals took place. 77 F.E.R.C. at 61,518, NC App. 118-19a.

Related proceedings

Virginia Beach's Corps permit, under CWA § 404, and its State certification, under CWA § 401, are discussed *supra* at 3-4. The Corps permit was granted in 1984 and amended in 1988, following a judicial remand. The Corps' permit action ultimately was sustained by the U.S. District Court in Raleigh, North Carolina, and the Court of Appeals for the Fourth Circuit, and this Court denied review. *State of North Carolina v. Hudson,* 665 F. Supp. 428 (E.D.N.C. 1987) *(Hudson I)*; *State of North Carolina v. Hudson,* 731 F. Supp. 1261 (E.D.N.C. 1990) *(Hudson II), aff'd, Roanoke River Basin Ass'n. v. Hudson,* 940

F.2d 58 (4th Cir. 1991) *(Hudson III), cert. denied*, 502 U.S. 1092 (1992).

In another related case, North Carolina and RRBA sued Virginia Beach in late 1990 to enjoin project construction pending FERC approval. The U.S. District Court in Raleigh granted the injunction, and Virginia Beach appealed. The Fourth Circuit reversed in part, allowing Virginia Beach to proceed with some limited, "critical path" construction. *State of North Carolina* v. *City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991). The injunction expired when FERC issued its final order in this case.

After VEPCO filed its application with FERC, in February 1991, North Carolina objected to Virginia Beach's project under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(3)(A), thereby blocking the FERC approval. Virginia Beach and VEPCO appealed the objection to the Secretary of Commerce. On May 20, 1994, the Secretary overruled North Carolina's objection, concluding, like the Corps before him and FERC after him, that Virginia Beach's project is both necessary and environmentally sound. The Secretary expressly found "*that the project meets the requirements of the Clean Water Act*" and "[t]he City has obtained the necessary CWA federal permit and state certification." DA 1667 (emphasis in original). North Carolina sued to set aside the Secretary's decision, but it did not challenge his Clean Water Act findings. The reviewing court sustained the Secretary's decision. *North Carolina v. Brown*, 42 E.R.C. 1254 (D.D.C. 1995). North Carolina did not appeal.

Virginia Beach's public water supply project

With over 400,000 residents, Virginia Beach is the largest city in Virginia. It is part of the southeastern Virginia urban complex comprising the contiguous cities of Virginia Beach, Norfolk, Chesapeake, Suffolk and Portsmouth, which together have a population of approximately 1 million. DA 3156. The region, and Virginia Beach in particular, have

suffered from a water shortage since at least 1974 when the U.S. Senate Committee on Public Works asked the Corps of Engineers to study and recommend water supply options for the area. DA 358. Since 1977 Virginia Beach and other cities in the region have been required to impose water use restrictions on their citizens during several droughts, and water rationing during a severe drought in 1980-81. DA 3150-51; 397-98, 839. By 1992, Virginia Beach's population had so far outgrown its sole source, the City of Norfolk's "surplus" water supply, that it was forced to impose permanent year-round restrictions on outdoor water uses and a moratorium on new connections to its public water system. Those measures applied even during non-drought periods and remained in effect until the pipeline became operational in November 1997. DA 1043-48.

Following the 1980-81 drought, Virginia Beach decided to build a pipeline to Lake Gaston to solve the regional water supply problem, as recommended by the Congressionally mandated Corps study. The pipeline was sized to withdraw up to 60 mgd from Lake Gaston, to be allocated 48 mgd to Virginia Beach, 10 mgd to Chesapeake and 2 mgd to two smaller localities. DA 3171. The water from the project, together with previously existing supplies, was expected to meet the region's water needs through the year 2030. DA 3139.

Lake Gaston and the Roanoke River system

The Roanoke River rises in the Appalachian Mountains of Virginia. It flows southeasterly, crosses into North Carolina near Roanoke Rapids and empties into Albemarle Sound some 145 miles downstream of Lake Gaston. Approximately 64% of the entire watershed, and 73% of the watershed above Roanoke Rapids Dam, is in Virginia. The rest is in North Carolina. DA 3210-11.

Lake Gaston is the second in a series of three impoundments of the Roanoke River that are located along the border of Virginia and North Carolina. The largest and

farthest upstream of the three impoundments is Kerr Reservoir, a Corps of Engineers project operated for flood control, power generation and other purposes, including water supply. Lake Gaston begins at the base of Kerr Dam, and Roanoke Rapids Reservoir begins at the base of the Gaston Dam. The latter two are FERC licensed hydropower projects. DA 3210-13, 3218-19. (See maps at Appendix A.)

Flows in the Roanoke River are regulated by these dams and reservoirs. In general, the dams withhold water from streamflow during high natural flows and return it during periods of lower flow. DA 3210-21. This regulation makes flows more uniform, but they still fluctuate widely. The average flow below Roanoke Rapids Dam is 8,050 cubic feet per second (cfs) (or 5,194 mgd), DA 3212, and the lowest yearly average flow was 3,117 cfs (2,011 mgd) in 1981, DA 3266, 3275[3]. Instantaneous flows vary from just over 1,000 cfs (the wintertime regulated minimum), DA 3237, to 30,000 cfs or more (during floods), DA 3231. Virginia Beach's maximum withdrawal of 60 mgd equals 93 cfs -- about 1.2% of the average flow and 3% of the lowest average annual flow on record.

VEPCO's FERC license requires it to release specified minimum flows from Roanoke Rapids Dam at all times, to maintain water quality downstream. DA 3232-33, 3238-41. The required minimums are 2,000 cfs in May through September, 1,500 cfs in April and October, and 1,000 cfs in November through March. DA 3237.[4]

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[3] Cfs ÷ 1.55 = mgd.

[4] By agreement among VEPCO, the Corps and North Carolina, VEPCO makes higher "augmented" releases during the striped bass spawning season, using water provided by the Corps from Kerr Reservoir storage. DA 3236-38. Contrary to RRBA's assertions, RRBA Pet. 9-10, Virginia Beach's withdrawals will not impair the ability to make these releases, even in the driest years, because Virginia Beach has purchased additional water storage in Kerr Reservoir which will be released to offset its withdrawals on the rare occasions they might otherwise cause the targets to be missed. DA 3296-99. As FERC (like the Corps and the

Virginia Beach's withdrawals will reduce the *total* amount of water that flows through the Gaston and Roanoke Rapids Dams, by a maximum of 93 cfs (60 mgd); but *they will not reduce the low flows at all.* Most of the water in Lake Gaston comes from Kerr Reservoir. The Corps' hydropower contracts require it to make releases from Kerr Reservoir which, together with local inflows to Lake Gaston and Roanoke Rapids Reservoir, average at least 545 cfs (352 mgd) more than VEPCO's minimum required releases at all times. *Hudson II*, 731 F. Supp. at 1263-64. Virginia Beach's 93 cfs maximum withdrawal will come from that "surplus," and VEPCO will maintain the minimum flows required by its license.

VEPCO's releases are governed by power demands and the minimum release conditions of its license. It generally releases only the minimums when power demands are low and stores the balance of the Kerr releases in Gaston and Roanoke Rapids Reservoirs to meet peak power demands. DA 3218-19; *Hudson II*, 731 F. Supp. at 1264. Releases into the lower Roanoke therefore follow a peak and valley pattern. DA 3231-32. VEPCO will not change its operations as a result of Virginia Beach's project, and the effect of the withdrawals will be simply to lower the peaks, but not the valleys. The same changes result from varying rainfall patterns, and would also result from withdrawals upstream of Lake Gaston, outside of FERC's jurisdiction.

North Carolina implies that the withdrawals will reduce flow by "almost ten percent," "during periods of low flow, when water quality is at greatest risk." NC Pet. 4. That is not true. North Carolina has simply compared Virginia Beach's 93 cfs maximum withdrawal to the 1,000 cfs *wintertime* regulated minimum. But Virginia Beach's withdrawals will *never* reduce the minimum flows, and even during the driest summers they will account for less than 4% of total flows.

Secretary of Commerce) concluded, "the project will not affect the reproductive success of striped bass in the Roanoke River." DA 3943.

(93 cfs + 2545 cfs = 3.65%). And most water quality problems occur in the summer and early fall, when *natural* low flows coincide with high air and water temperatures. DA 3217-18. That is why higher (2,000 cfs) minimum releases are required in the warmer months; and as discussed above, at least 545 cfs more than the minimum is available even during those periods.

Likewise, North Carolina's contention that Virginia Beach's project will "reverse the . . . flow" of water in a "small tributary" of Lake Gaston is misleading at best. NC Pet. 4. Like all of Lake Gaston, Pea Hill Cove is a flooded valley. It has some natural inflow, but the great majority of its water flowed from Kerr Reservoir and was backed up by Gaston Dam. Because VEPCO raises and lowers the lake level in its power operations, the flow in Pea Hill Cove "resembles a tide, sometimes flowing into and sometimes flowing out of the cove." DA 3219. The volume of this tide is 17 times greater than Virginia Beach's maximum withdrawal and dwarfs any effect it might have on the direction of stream flow. DA 70.

It also is not true, as RRBA argues, that "FERC itself also concluded that the license amendment could result in an adverse impact on downstream uses." RRBA Pet. 9. In fact, FERC concluded that the project "will not adversely affect water availability in the reservoir area, the upper basin, or the lower basin," DA 3938, "will not affect the reproductive success of striped bass in the Roanoke River," DA 3943, "will have no measurable impact on water quality in the lower Roanoke River," DA 3942, and "would be beneficial, and not deleterious to the environment." DA 3939. FERC's conclusions echoed those of the Corps and the Secretary of Commerce, as affirmed by the Fourth Circuit and the U.S. District Court for the District of Columbia, respectively. *See Hudson III*, 940 F.2d at 64, *aff'g State of North Carolina* v. *Hudson*, 665 F. Supp. 428, 438-39 (E.D.N.C. 1987) (*Hudson I*); *North Carolina* v. *Brown*, 42 E.R.C. 1254, 1247, 1262 (D.D.C. 1995).

ARGUMENT

This case presents no issues of national significance warranting an exercise of this Court's *certiorari* jurisdiction

North Carolina argues that the decision below will have a dramatic impact on the "more than one thousand hydroelectric dams in the United States" by "suspend[ing]" State certification power between the time of licensing and relicensing. NC Pet. 13-14. RRBA goes even further, arguing that the decision eliminates the need for certification even at original licensing or relicensing. RRBA Pet. 13-14.

Those arguments are simply hyperbole, offered to attract this Court's attention to a routine case. In truth, the decision below is consistent with everyone's previous understanding of the way the statute works in a case like this, as was indicated by North Carolina's own conduct; and it will not in any way change the manner in which the nation's hydroelectric projects are regulated. The case would have been significant only if it had been decided the other way, allowing downstream States to veto water uses in upstream States.

This case demonstrates that water withdrawal projects do and will continue to require State certification. There is no practical way to withdraw significant amounts of water from a river or reservoir without building an intake structure, which requires the discharge of dredged and fill materials and therefore requires certification from the State where it is located.[5] This is true for other types of projects that affect water quality as well, and that is why Congress chose the mechanism of a "discharge" as the triggering condition for § 401 certification.

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[5] RRBA's suggestion that withdrawals from a certified intake structure could later be increased without additional certification is incorrect. RRBA Pet. 18 n.16. In this case, for example, Virginia's certification limits Virginia Beach's withdrawals to 60 mgd, and increased withdrawals would require an amended Virginia certification. CWA § 401(d), 33 U.S.C. § 1341(d).

As a practical matter, any new activity that requires a new federal license or permit, and that affects water quality, will also involve a new discharge and a State certification. And in connection with the certification of *new* discharges, Congress provided States with the tools necessary to protect against future *alterations* in discharges that they might find problematic, by imposing conditions under § 401(d), which automatically become conditions on any federal licenses. For example, a State can protect against future changes by imposing minimum stream flow conditions. *See PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707-08 (1994); 33 U.S.C. § 1341(d). *See also American Rivers, Inc. v FERC*, 129 F.3d 99 (2d Cir. 1997) (holding that FERC may not omit "reopener" conditions in a State's § 401 certification, if it issues a license).[6]

RRBA's suggestion that the Court of Appeals' decision will eliminate the need for State certification at licensing or relicensing is certainly misplaced. This is not a licensing or relicensing case, and the Court of Appeals did not decide whether certifications are necessary at such times. Indeed, that court simply assumed *arguendo* that releases of water through a hydroelectric dam are a "discharge" that would require certification at licensing, and went on to hold that a reduction in such ongoing releases is not a discharge. 112 F.3d at 1187, NC App. 16a. As petitioners assert, there are more than 1,000 hydroelectric projects in the country and many of them soon will be considered for relicensing (including this one, in 2001). Any questions regarding the need for certification at relicensing should be resolved in one

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[6] North Carolina acknowledges that *American Rivers* reaffirmed the "broad scope of State authority under Section 401." NC Pet. 13. But neither *American Rivers* nor *PUD No. 1* nor any other decision, to our knowledge, holds that a State has § 401 authority to veto activities that occur entirely in *another State*, on the rationale argued here or any other. *American Rivers* further demonstrates, however, that under § 401 States have ample authority to protect themselves against adverse effects of future *changes* in a certified project.

of the many cases which involve that issue, and not in this case which does not.

Petitioners' interpretation of § 401 is unprecedented, and North Carolina's own conduct shows that it is contrary to the previous expectations of all concerned parties. Despite its titanic struggle against Virginia Beach's project, North Carolina never suggested that it had § 401 certification authority over the project until May 1994, eleven years after it began opposing the project, more than three years after VEPCO applied for FERC approval of the project, and twelve days after the Secretary of Commerce voided North Carolina's CZMA objection and ruled that Virginia Beach had obtained all necessary § 401 certifications. Obviously, North Carolina itself had no idea that it had § 401 certification authority until its lawyers concocted that theory, after running out of other options, or it would have argued that point to the Secretary and appealed the Secretary's contrary finding.

A decision adopting petitioners' arguments, on the other hand, would have been truly significant, because it would have led to multiple interstate conflicts of the type that Congress sought to avoid by its careful assignment of roles to "source" and "affected" States in §§ 401(a)(1) and (2). *See infra* at 20-22. For example, a diversion from a Montana power company reservoir on the Missouri River in Montana would require certifications from Montana, North Dakota, South Dakota, Nebraska, Louisiana and every other downstream State on the Missouri/Mississippi River system in which a dam is located, because flows through each of those dams would be reduced by the amount of the diversion.[7] "It is unlikely -- to say the least -- that Congress intended to establish such a chaotic regulatory structure" under the Clean Water Act. *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

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[7] North Carolina's counsel conceded this point at oral argument in the Court of Appeals. *See* Transcript of argument, September 9, 1996, at 6 (excerpts reprinted as Appendix B).

The Court of Appeals' decision is not in conflict with any other Circuit

The Court of Appeals' decision does not conflict with the Fourth Circuit's decision in *City of Fredericksburg v. FERC*, 876 F.2d 1109 (1989), and petitioners' pale effort to assign such a conflict shows how far they are grasping for straws. The *Fredericksburg* decision does not consider the meaning of the term "discharge" in § 401, nor does it remotely suggest that a reduction of ongoing flows through a dam could be a statutory discharge.

The issue in *Fredericksburg* was whether a State had waived its right to issue a § 401 certification for construction and operation of hydroelectric generating facilities at an existing dam. The court's holding (that an applicant must request certification in accordance with State filing procedures before there can be a waiver) was based on a FERC regulation, not on the statute. *See id.* at 1111 & n.1. The existence of a discharge was not in dispute; and the opinion does not even identify the discharges that triggered the certification requirement, much less suggest that changes in flows resulting from hydropower operations might be such a discharge. It is clear from the FERC decisions under review in *Fredericksburg*, however, that construction of the new hydropower facilities would involve construction discharges that would certainly require certification, just as Virginia Beach's project did.[8] In short, there is nothing expressed or implied in the Fourth Circuit's decision to suggest that it

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[8] *See Commonwealth Electric, Inc.*, 43 F.E.R.C. (CCH) ¶ 61,300, at 61,819 (1988) (construction of a "rock-core earthen flood control berm across the canal . . . to deflect flood flows from the canal back into the river") and 61,823-24 (license articles 303, dealing with construction of "water retention structures, powerhouse, and water conveyance structures"; 304, "cofferdams and deep excavations"; and 401, "plan to control erosion, dust, and slope stability, and to minimize the quantity of sediment and other potential water pollutants resulting from project construction, spoil disposal and project operation and maintenance").

considered reductions in flow to be triggering discharges under § 401.

Virginia Beach's water withdrawals will not result in any discharge into the navigable waters within the meaning of Section 401(a)(1)

The petitions challenge the Court of Appeals' holding that Virginia Beach's withdrawal of water does not "result in a discharge into the navigable waters" because it adds nothing to the waters. They argue that "result in a discharge" means "result in a discharge *or the alteration of a discharge*," and that the reduction of flow over the dam in North Carolina is the alteration of a discharge. That is not what Congress said or meant.

The Court of Appeals' conclusion, that a "discharge" within the meaning of § 401 "contemplates the addition, not the withdrawal, of a substance or substances," 112 F.3d at 1187, NC App. 17a, follows inescapably from the ordinary meaning of the words Congress used. In ordinary English "discharge" means an "issuing out" or "emission." *Websters New Int'l Dictionary* 644 (3d ed. 1961). "Into" is a preposition which denotes motion or penetration to or of a place or thing from outside the place or thing. *Id.* at 1184. Used together, the words "discharge into" the navigable waters plainly mean the emission of something from outside the waters into the waters -- that is, the addition of something to the waters.[9]

The Court of Appeals found support for this plain language reading of "discharge" in 33 U.S.C. § 1362(12), which defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any

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[9] FERC analyzed petitioners' argument thus: "We believe that the plain and commonly understood meaning of the phrase 'discharge *into* the navigable waters' (emphasis added) is unduly strained if it is read to include the removal of something that was already in the water, and is particularly strained if it is read to include the removal of the water itself." 77 F.E.R.C. at 61,517, NC App. 115a.

point source." Petitioners argue that in so doing the Court of Appeals equated the term "discharge" with the term "discharge of a pollutant," and thereby improperly narrowed the meaning of the original term. It did no such thing. Instead, the court reasoned that if "discharge of a pollutant" means the "addition of a pollutant," then the word "discharge" must contemplate "addition" of *something*, whether it is a pollutant or not. The court's holding is entirely consistent with the notion that "discharge," without the limiting phrase "of a pollutant," is a broader term than "discharge of a pollutant"; and it simply recognizes that Congress undoubtedly intended that the word "discharge" have the same meaning throughout the Act. *See* 112 F.3d at 1187 n.4, NC App. 17a.

The Court of Appeals' conclusion, that a withdrawal of water is not a discharge, is consistent with *Save Our Community v. U.S.E.P.A*, 971 F.2d 1155 (5th Cir. 1992), which held that removal of water from wetlands by use of a mechanical pump was not a "discharge" requiring a permit under CWA § 404. In that case, the court found that it was unnecessary to resort to legislative history because under the plain language of the statute, "the existence of discharge is critical," and the withdrawal of water is not a discharge. *Id.* at 1163.

Save Our Community confirms the unanimous opinion of federal agencies that a discharge -- a physical *addition* of something *into* "navigable waters" -- is the *sine qua non* of Clean Water Act jurisdiction. *See id.* at 1158 n.6, 1163. That opinion was reiterated in a recent amendment to the Corps' and the EPA's § 404 regulations. 58 Fed. Reg. 45008 (1993). The amendment brought certain land clearing and excavation activities under § 404 for the first time, by defining "discharge of dredged material" as including "[a]ny *addition*, including redeposit, of dredged material, including excavated material, *into* waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2

(d)(iii) (emphases added). In amending the quoted regulation, both the Corps and the EPA adhered to the view that *removing* materials *from* "navigable waters" is *not* a "discharge into" such waters: "EPA and the Corps agree that the presence of a discharge into waters of the U.S. is an absolute prerequisite to an assertion of regulatory jurisdiction under § 404 . . . . [T]his has been the agencies' long-standing position, and we are not altering that view in this rulemaking." 58 Fed. Reg. at 45011.

Petitioners' insistence that this case presents the question of how "altered" discharges should be treated under § 401 is semantic sleight of hand. This case involves a *reduced* discharge. A reduced discharge is an "altered" discharge, to be sure; but it is markedly different from an *increased* discharge -- which also is an altered discharge. An increased discharge may well add a substance to the water by increasing whatever is being discharged into the water, and it would require certification. A reduced discharge does not. The difference is significant. As the Court of Appeals observed, the triggering event selected by Congress for certification is an activity which "results" in or "causes" a discharge, and an activity that reduces a preexisting discharge does not cause the discharge. 112 F.3d at 1188, 1186 n.2, NC App. 18-19a, 15a. Water has continuously discharged through Gaston Dam for 35 years. That discharge will not be increased by Virginia Beach's project, nor will it in any sense "result" from the project.

The Court of Appeals' decision is in no way inconsistent with *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S. 700 (1994). That case involved a FERC license and 401 certification for a *new* dam, which "would divert water from a 1.2 mile reach of the River (the bypass reach), run the water through turbines to generate electricity and then return the water to the River below the bypass reach." 511 U.S. at 708-09. The parties agreed (but the Court did not decide) "that the project will result in two possible discharges," discharges of dredged and fill material during

construction and discharges of water back to the river after the bypass. *Id.* at 711. As the Court of Appeals observed, *PUD No. 1* "never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of section 401(a)(1)." 112 F.3d at 1188, NC App. 20a. And this case, unlike *PUD No. 1*, does not involve either a new dam or the return of water to a river after a diversion. Water has been discharged from the Gaston Dam for the past 35 years, and the issue here is whether *removing* water, *not* returning it to the river after a bypass, results in a discharge.

The decision below also is consistent with *PUD No. 1*'s recognition that a reduction in water quantity can affect water quality. The question in *PUD No. 1* was whether the State could require minimum stream flows *in the bypass reach*, as a condition of its § 401 certification. The license applicants (petitioners) contended that the minimum flow condition was unlawful because it was unrelated to either of the acknowledged discharges. The Court rejected that argument, holding that § 401(d) authorizes conditions to prevent water quality effects of a project that are *not* caused by a discharge. In so doing, the Court implicitly recognized that a *reduction* in flow caused by a water diversion is *not* a "discharge," even though it may affect water quality. The Court stated:

> If § 401 consisted solely of subsection (a), which refers to a state certification that a 'discharge' will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project.

511 U.S. at 711. The minimum flow condition was *directly* related to the flow reduction caused by the diversion -- it directly *limited* the amount of flow reduction allowed in the bypass reach. If the reduction in flow were a "discharge," the

petitioners' argument would have had no force at all; and it would have been unnecessary for the Court to look to § 401(d) to find authority for the condition. As the dissenting Justices observed in *PUD No. 1*, the Court had to rely on § 401(d) because "[t]he minimum stream flow condition imposed by [the State] in this case has no relation to any possible 'discharge' that might 'result' from [the applicants'] proposed project," and "a minimum stream flow requirement is a limitation on intake — the opposite of discharge." *Id.* at 725.

PUD No. 1 also described the difference between the issues in that case and this one, and the "threshold" limitation that Congress set on States' § 401 certification power:

> Section 401(a)(1) identifies the category of activities subject to certification — namely those with discharges. And § 401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole *once the threshold condition, the existence of a discharge, is satisfied.*

511 U.S. at 711-12 (emphasis added).

The issue here is whether the threshold condition is satisfied. In *PUD No. 1* the threshold condition was conceded, and the issue was whether the State's minimum flow condition was authorized by the statute and appropriate to protect water quality. It was in that context that the Court recognized that a reduction in water quantity could have a water quality effect. But the Court did not suggest that every activity that might have a water quality effect is subject to State certification, whether there is a discharge or not. To the contrary, the Court emphasized that Congress' "threshold condition" of a discharge must be satisfied before any condition could be imposed.

North Carolina argues that the statute contemplates certification when existing discharges are altered because it requires certification from the State where a discharge "originates or will originate," and because "will originate"

must refer to new discharges and "originates" to existing discharges. NC Pet. 16. That argument is insupportable as a matter of logic or of language. It sets up an internal conflict in § 401(a)(1), because § 401(a)(1) applies to activities "which may result in" any discharge, and an activity cannot "result in" a discharge that already exists. It seems obvious that the phrase "originates or will originate" was used because *any* discharge that may result from a federally licensed activity triggers the need for certification – including any *future* discharge that "will originate" from *operation* of a licensed facility, in addition to (or in the absence of) any discharge that "originates" from *construction* of the facility.

North Carolina's argument that the statutory definition of "pollutant" includes heat, and therefore that a "discharge of a pollutant" could include the addition of heat to the water rather than some "substance," is beside the point. *See* NC Pet. 16. This case does not involve the addition of heat, or anything else, to the water. This case involves a very slight *reduction* in the total volume of flow (but not the low flow) of water through a dam. The fact that the *addition* of heat to water might be the discharge of a pollutant is irrelevant to the question whether this *reduction* in water flow is a discharge.

Any discharge resulting from Virginia Beach's project "originates" in Virginia, not North Carolina; and therefore Virginia has certification authority under Section 401(a)(1) and North Carolina is an "affected" state under Section 401(a)(2)

In the Clean Water Act, Congress sought to leave jurisdiction over water management issues primarily in the hands of the States, which traditionally have jurisdiction over waters within their borders. But Congress recognized that interstate conflicts, like the one presented here, would arise if two or more States had regulatory authority over the same project, and it refused to give any State authority over activities in other States. Its solution was to give each State

authority over *intra*state water quality impacts,[10] and to give the EPA authority over impacts in *other* States.

Congress accomplished this by providing in § 401(a)(1) that a certification is necessary from the State where a discharge "originates," and in § 401(a)(2) that any other State which may be affected by the activity may apply to the EPA to determine whether water quality in that State will be adversely affected. As the Court explained in *International Paper Co. v. Ouellette*, 479 U.S. 481, 490-91 (1987):

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters.

In this case, the only discharge resulting from Virginia Beach's project was the discharge of dredged and fill material during construction, and that "originated" in Virginia. But even if the reduction in flow at Gaston Dam were also regarded as a "discharge," as North Carolina contends, that also would "originate" in Virginia, because that is where Virginia Beach withdraws the water. The flow through the

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[10] *See PUD No. 1*, 511 U.S. at 707: § 401 "requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into *intrastate* navigable waters." (Emphasis added.)

dam will be reduced *solely* because Virginia Beach is taking water out of Lake Gaston in Virginia. *Nothing* will be done in North Carolina. The reduction in flow will occur in North Carolina, but it will "originate" from activity in Virginia.

In *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990), the court confirmed that a discharge originates where the activity which causes the discharge occurs, and not where its effects are felt. That case involved a new reservoir located in Oklahoma and Arkansas, behind a dam in Arkansas. The discharge in question was the erosion of soils from the banks of the reservoir *in Oklahoma*. The court upheld FERC's "[c]ommon sense" conclusion that those discharges would originate at the dam, in Arkansas, because that was "where the flow of water would be blocked and consequently the water would be backed up, rather than at some point upstream . . . where the soil eroded as a result."

Here, the statute operated precisely as Congress intended. Virginia, the "source" State where any relevant discharge originated, issued a certification under § 401(a)(1). North Carolina, an "affected" downstream State, asked EPA to require a water quality hearing pursuant to § 401(a)(2). EPA declined, because Virginia Beach's withdrawal will not affect water quality in North Carolina. "This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the often competing concerns of those affected by the pollution." *International Paper*, 479 U.S. at 497. That balance should not be upset; the statute has been and should be applied as it was written.

North Carolina's claim to Section 401 certification authority is barred by the doctrines of *res judicata* and collateral estoppel

As discussed *supra* at 6, Virginia Beach and VEPCO appealed North Carolina's CZMA objection to the Secretary of Commerce. North Carolina defended its objection on the ground, among others, that Virginia Beach's project would

violate the CWA. The Secretary rejected its arguments and found "*that the project meets the requirements of the Clean Water Act,*" and "[t]he City has obtained the necessary CWA federal permit and state certification" for FERC to approve the City's project. DA 1667 (emphasis in original). North Carolina appealed the Secretary's decision, the District Court affirmed, and its decision is final. *North Carolina v. Brown*, 42 E.R.C. 1254 (D.D.C. 1995). Accordingly, North Carolina is barred by the doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) from claiming that its certification also is necessary for FERC to approve the City's project.

Res judicata and collateral estoppel bar relitigation of an administrative agency's decision of disputed issues "which the parties have had an opportunity to litigate," if the agency acted in a "judicial capacity" (as the Secretary of Commerce did here). *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). *See, e.g., Exxon Corp. v. Fischer*, 807 F.2d 842, 846-47, *amended on other grounds*, 817 F.2d 1429 (9th Cir. 1986) (according preclusive effect to Secretary of Commerce's decision in a CZMA appeal). North Carolina undeniably had "an adequate opportunity to litigate" issues under the CWA, including § 401, in the CZMA appeal. *See* 15 C.F.R. § 930.121(c) (Secretary's regulations providing that a CZMA objection will be set aside only if, *inter alia*, "the activity will not violate any requirements of the . . . Federal Water Pollution Control Act"). Likewise, the Secretary undeniably acted in a "judicial capacity." *See Exxon Corp. v. Fischer, supra,* 807 F.2d at 846. North Carolina, Virginia Beach and VEPCO were parties to the CZMA appeal and to the proceeding below, and the Secretary decided the same issue that is presented here -- whether Virginia Beach and VEPCO had obtained the Clean Water Act certification necessary for FERC to approve VEPCO's application.[11]

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[11] RRBA also is bound by the Secretary's adjudication against North Carolina, of course, because "they, in their common public rights as citizens of the State, were represented by the State in those proceedings,

Neither FERC nor the Court of Appeals addressed this argument, because they rejected North Carolina's claim of certification authority on the other grounds advanced in this brief. Nevertheless, North Carolina's claim can and should be rejected on the basis of these preclusion doctrines as well.

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and, like it, were bound by the judgment." *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958) (adjudication of state's unsuccessful opposition to FPC dam license was binding on city and citizens of state). *See Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 97-101 (5th Cir.), *cert. denied*, 434 U.S. 382 (1977) (judgment against city declaring ordinance unenforceable against Southwest precluded other airlines from relitigating enforceability of ordinance against Southwest in another court as "private Penforcers"); *Michigan v. Allen Park*, 573 F. Supp. 1481, 1484 n.5 (E.D. Mich. 1983) ("It is established law that when a governmental entity litigates a matter involving diffused private rights . . . , private citizens are bound by the results); 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4458 at 513 (1981) ("government litigation can preclude relitigation by individuals who assert no nore than a general public interest").

CONCLUSION

This case presents no issues of national significance. It involves only the straightforward application of plain statutory language, and it was correctly decided by FERC and the Court of Appeals. This Court should deny the petitions for writ of certiorari and end the fifteen year controversy over Virginia Beach's essential public water supply project.

Respectfully submitted,

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January 21st, 1998

APPENDIX A

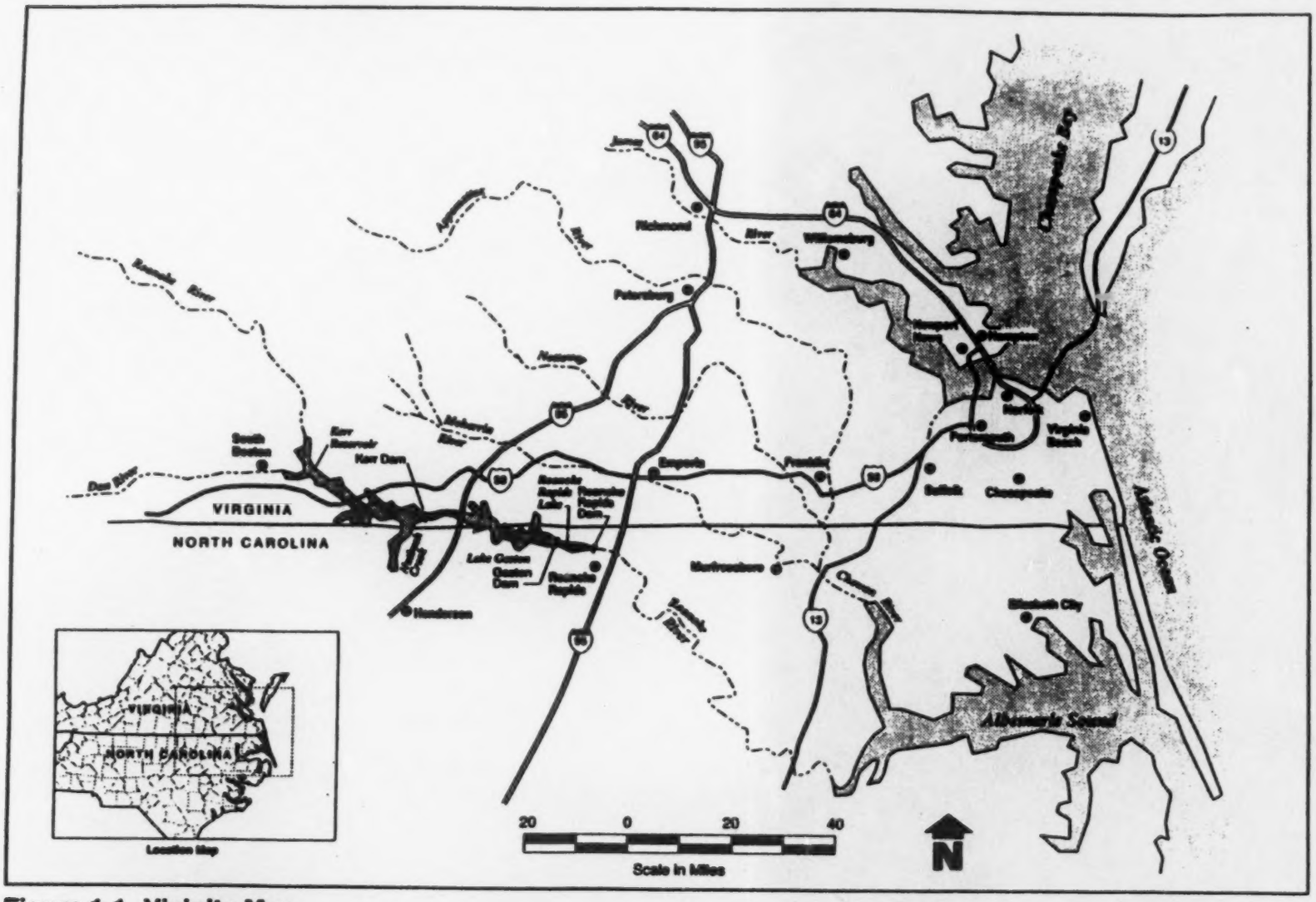

Figure 1-1. Vicinity Map
(Source: Staff, as modified from Corps, 1984 and AAA road map, 1993.)

1-2

DA 3148

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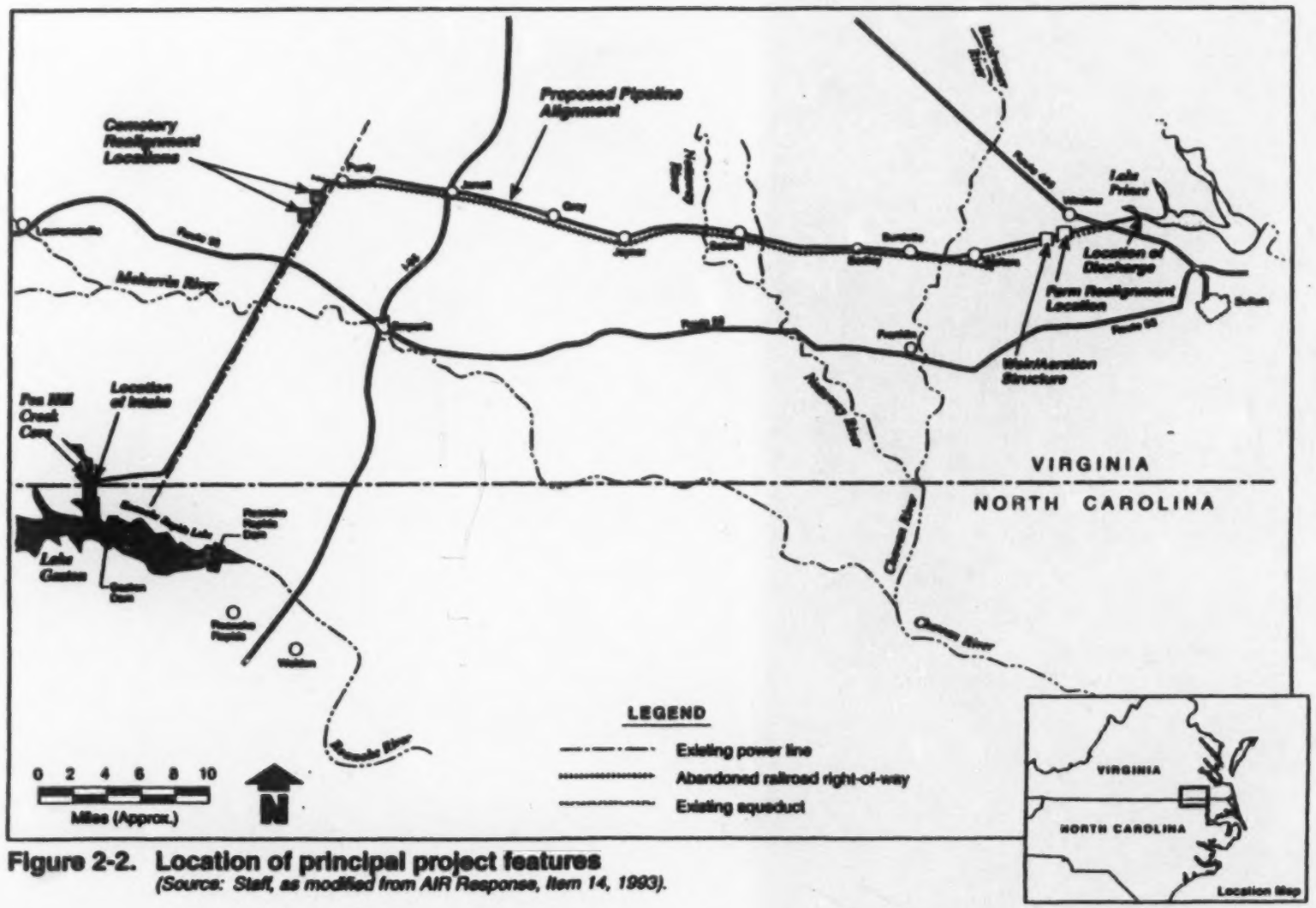
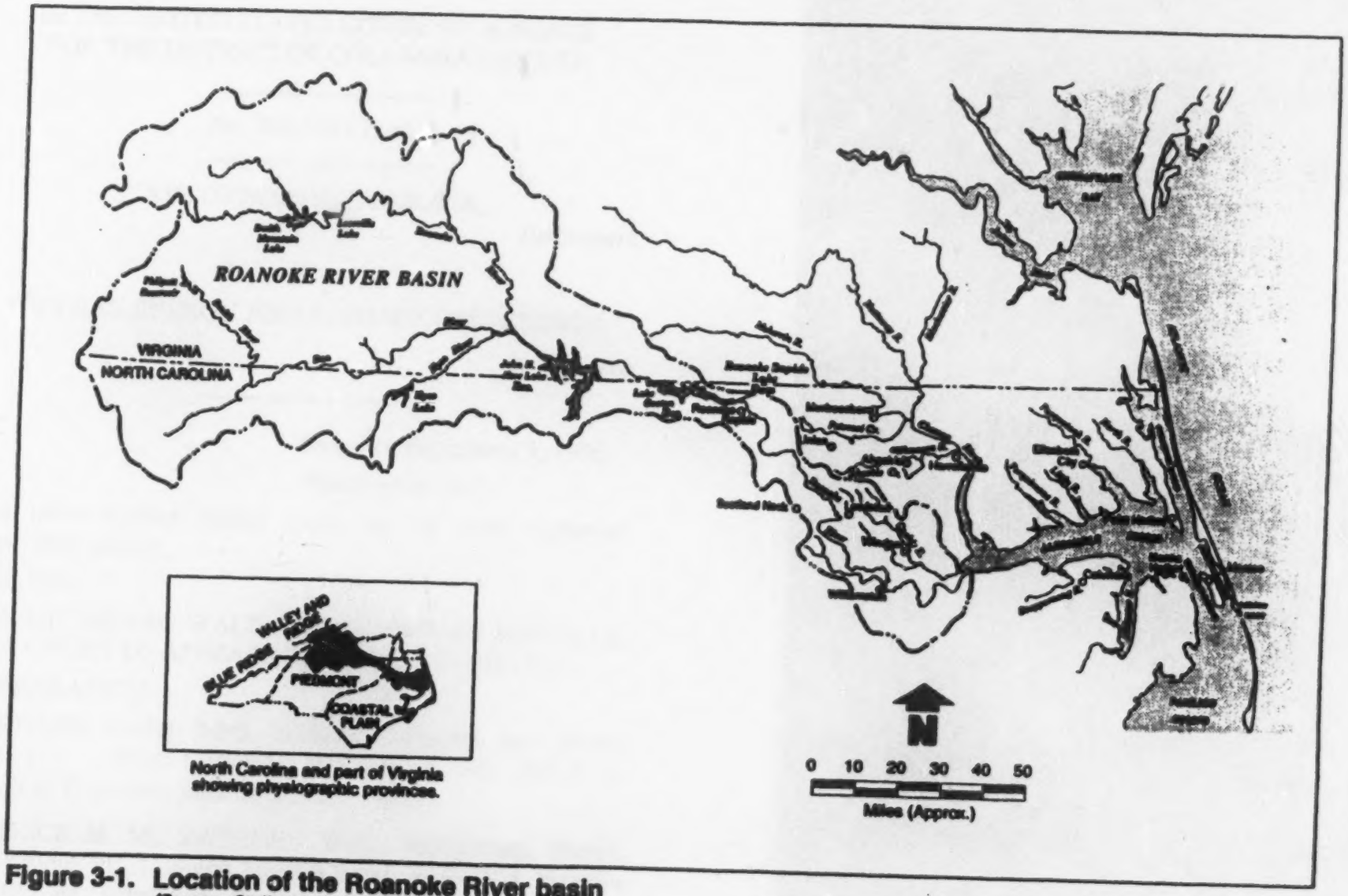


Figure 2-2. Location of principal project features
(Source: Staff, as modified from AIR Response, Item 14, 1993).



North Carolina and part of Virginia showing physiographic provinces.

Figure 3-1. Location of the Roanoke River basin
(Source: Staff, as modified from USGS, 1993.)

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 905-1494 *et al.*

STATE OF NORTH CAROLINA,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Monday, September 9, 1996

Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE:

CIRCUIT JUDGES WALD, SILBERMAN and SENTELLE, U. S. COURT OF APPEALS FOR THE D. C. CIRCUIT.

APPEARANCES:

BERNARD NASH, ESQ., Dickstein, Shapiro and Morin, LLP, 2101 L Street, Northwest, Washington, D.C. 20037; on behalf of Petitioner, State of North Carolina.

PATRICK M. MC SWEENEY, ESQ., McSweeney, Burtch and Crump, PC, 11 South Twelfth Street, Richmond, Virginia 23212; on behalf of Petitioner, Roanoke River Basin Association.

EDWARD S. GELDERMANN, ESQ., Federal Energy Regulatory Commission, 888 First Street, Northeast, Washington, D.C. 20426; on behalf of Respondent.

M. SCOTT HART, ESQ., Mays and Valentine, Nations Bank [sic] Center, 1111 East Main Street, Richmond, Virginia 23208; on behalf of the Intervenors.

* * *

MR. NASH: Section 401 of the Clean Water Act requires any application for any discharge, for any activity that will result in a discharge originating in a state to be certified.

QUESTION: We're doing great so far. We're doing real good so far. What is it in this case that makes the--

MR. NASH: In this case, it is the altered operation of the hydroelectric facility at the Lake Gaston Dam.

QUESTION: Why isn't that taken care of in 401(2), which deals with the downstream implications of an original discharge and allows a state that is affected by the downstream implications of that certain rights and et cetera, et cetera? Why is the argument which, I take it, you're making that any time something happens in one state where there is at least one origination of a discharge and it gets--that results in a lower flow. Say, it went through seven different states and the flow got low in every one of those states.

Would you say they came under--you had to be certified because the flow got less and less?

MR. NASH: There is a total different--the answer is yes. There is a total different operation at the Lake Gaston hydroelectric project. FERC required an amendment to be filed to the license to operate it.

FILED
JAN 21 1998
CLERK

Nos. 97-836 and 97-839

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NORTH CAROLINA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ROANOKE RIVER BASIN ASSOCIATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly determined, in approving an amendment to an existing hydropower license, that no water quality certification by the State of North Carolina was required under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1), because the amendment would not "result in any discharge into" North Carolina waters.

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a[1]) is reported at 112 F.3d 1175. The court's earlier order remanding the record to FERC, and the amendment to that order, appear at Pet. App. 49a-54a.

[1] Unless otherwise indicated, references to "Pet. App." refer to the Appendix in No. 97-836.

The opinions of the Federal Energy Regulatory Commission (Pet. App. 55a-129a) are reported at 72 F.E.R.C. ¶ 61,075, 72 F.E.R.C. ¶ 61,283, and 77 F.E.R.C. ¶ 61,138.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a-48a) was entered on May 9, 1997. A petition for rehearing was denied on August 21, 1997. Pet. App. 130a-131a. The petition for a writ of certiorari was filed on November 19, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the Clean Water Act (CWA), 33 U.S.C. 1341(a)(1), provides, in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with * * * [the effluent limitations and water quality requirements of the CWA]. No license or permit shall be granted until the certification required by this section has been obtained or has been waived * * *. No license or permit shall be granted if certification has been denied by the State.

Section 401(d) of the CWA, 33 U.S.C. 1341(d), provides:

> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements neces-

> sary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations [under 33 U.S.C. 1311, 1312, 1316, and 1317], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

STATEMENT

1. Sections 4(e) and 10(a) of the Federal Power Act (FPA), 16 U.S.C. 797(e), 803(a)(1), authorize the Federal Energy Regulatory Commission (FERC) to issue licenses for the construction and operation of hydroelectric projects, subject to the condition that the project licensed "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways."[2] 16 U.S.C. 803(a)(1). In addition, Section 6 of the FPA, 16 U.S.C. 799, provides that "[e]ach such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of the [FPA], and such further conditions, if any, as the Commission shall prescribe." Licenses may then be altered only upon mutual agreement between the licensee and the Commission. *Ibid.*

2. In 1983, the City of Virginia Beach, Virginia, applied for a dredge-and-fill permit from the U.S.

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[2] Section 3(11) of the FPA, 16 U.S.C. 796(11), defines "project" as the "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures * * * and all water-rights, rights-of-way, ditches, dams, reservoirs * * * the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit."

Army Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1344 to construct a new water supply facility that would withdraw up to 60 million gallons per day (mgd) from Pea Hill Creek. The Creek is a tributary of the Roanoke River, a navigable waterway that traverses both Virginia and North Carolina.[3] Specifically, the City proposed to install a water intake structure on the Virginia side of the Lake Gaston hydropower project licensed by FERC to the Virginia Electric and Power Company (VEPCO), and to construct a 76-mile pipeline, entirely in Virginia, to transport the water to treatment facilities near the City of Norfolk, Virginia.[4] Shortly thereafter, the Commonwealth of Virginia issued a water quality certification for the project in connection with VEPCO's dredge-and-fill permit application to the Corps of Engineers, pursuant to Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1). Subsequently, in 1984, the Corps of Engineers determined to issue the requested dredge-and-fill permit, over the opposition of the State of North Carolina and the Roanoke River Basin Association (RRBA).[5] Pet. App. 3a-4a.

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[3] The Roanoke River basin "extends approximately 400 miles from its headwaters in the Blue Ridge mountains of Virginia to its mouth in the Albemarle Sound of North Carolina. Approximately 64 percent of the basin lies in Virginia, and the rest in North Carolina." Environmental Impact Statement (EIS) at 3-1 (C.A. Deferred Appendix (C.A. Def. App.) 3210).

[4] Virginia Beach has no potable water supply of its own, and must purchase all of its water from the adjacent city of Norfolk. Pet. App. 89a.

[5] The history of the Corps of Engineers proceedings is set out in *North Carolina* v. *Hudson*, 665 F.Supp. 428 (E.D.N.C.

In 1991, VEPCO filed an application with FERC, on behalf of Virginia Beach, to amend its hydropower license to permit the City to build the water intake structure within the licensed project boundaries, and to withdraw the water from a point inside those boundaries on the Virginia side of that project.[6] North Carolina and RRBA intervened before FERC to oppose the issuance of the license amendment.[7] Pet. App. 4a-6a.

In July 1995, the Commission issued a detailed environmental impact statement (EIS) finding that Virginia Beach would need at least 60 mgd of water by the year 2030 to alleviate severe water shortages; that the proposed water supply project would ensure Virginia Beach a safe, reliable, and relatively inexpensive source of potable water; and that the City's

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1987), *North Carolina* v. *Hudson*, 731 F.Supp. 1261 (E.D.N.C. 1990), and *Roanoke River Basin Ass'n* v. *Hudson*, 940 F.2d 58 (4th Cir. 1991), cert. denied, 502 U.S. 1092 (1992).

[6] VEPCO and its affiliate, North Carolina Power, serve markets in both Virginia and North Carolina. VEPCO has taken no position in this dispute. R. 27203-27204.

[7] That same year, North Carolina also lodged an objection to the project before the Secretary of Commerce under the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* As a result, FERC suspended the license amendment proceeding pursuant to 16 U.S.C. 1456(c)(3)(A). On May 19, 1994, the Secretary of Commerce issued an order rejecting North Carolina's CZMA objections on the merits, and that order was sustained on judicial review. *North Carolina* v. *Ronald H. Brown*, No. 94-1569 (TFH) (D.D.C. Sept. 27, 1995). Eleven days after the Secretary overruled its CZMA objections, North Carolina supplemented its opposition to the license amendment before FERC by asserting for the first time a right to certify the water supply project under CWA Section 401(a)(1), 33 U.S.C. 1341(a)(1).

proposal would be the best alternative to meet its water needs. EIS at xviii, xxii (C.A. Def. App. 3140, 3144). Furthermore, after evaluating the proposal's effects on both the areas immediately surrounding the intake structure and the downstream reaches of the Roanoke River in North Carolina, the EIS found that the environmental impact of the City's water project would be minimal. EIS at xix-xxii (C.A. Def. App. 3141-3144).

Relying on the EIS, the Commission issued an order that same month granting a license amendment to allow the City's project to proceed. Pet. App. 55a-87a. In that order, the Commission rejected the contention by petitioners that the Commission should not amend the license unless VEPCO first obtained a water quality certification from the State of North Carolina pursuant to Section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1). Under that Section, an applicant for a federal license or permit "which may result in any discharge into the navigable waters" must provide a certification from the State "in which the discharge originates or will originate" that the discharge will comply with the effluent limitations and water quality standards of the Clean Water Act, including state water quality standards. The Commission assumed, without deciding, that that provision applied to this case, because water is discharged from the dam itself and the amount of water released at the dam would be reduced by VEPCO's withdrawals from the Lake. The Commission determined, however, that the license amendment did not require certification by North Carolina. The Commission based that determination on FERC regulations that do not require certification of activities covered by a license

amendment where, as it found to be the case here, the activities would not have a material adverse impact on the water quality in the discharge from the hydropower project. Pet. App. 67a-68a.[8] Moreover, in a subsequent order denying rehearing (*id.* at 88a-106a), the Commission concluded that North Carolina had waived any claim that the project requires a certification by North Carolina under Section 401(a)(1), since it had participated fully in the Corps' permit proceedings without ever asserting before the Corps of Engineers a right to certify the project. *Id.* at 96a-98a. North Carolina and RRBA then sought judicial review of those orders under 16 U.S.C. 825*l*.

3. After initial briefing and oral argument, the court of appeals in September 1996 remanded the matter to the Commission, directing that the Commission—instead of merely assuming the application of Section 401(a) in the circumstances of this case — should decide "whether § 401(a)(1) applies to require a certification from North Carolina." Pet. App. 52a.

4. In a supplemental order on remand, entered November 7, 1996 (Pet. App. 107a-129a), FERC concluded that Section 401(a)(1) did not apply to this case, for two reasons.

First, the Commission noted that the license amendment sought in this case involves the removal of water from Lake Gaston. In the Commission's view, "Congress intended the word 'discharge' [in

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[8] Section 4.38(f)(7)(iii) of the Commission's Regulations, 18 C.F.R. 4.38 (f)(7)(iii), provides that an application to amend an existing hydropower project license must include a new request for water quality certification "if the amendment would have a material adverse impact on the water quality in the discharge from the project."

Section 401(a)(1)] to include only substances that are added to the water in some manner, and did not intend to include the withdrawal of the water itself within the scope of that term." Pet. App. 115a.

Second, the Commission concluded, "as an alternative basis for decision," that, "even if the word 'discharge' is ultimately determined to be broad enough to include the removal of water from the water, * * * the activity involved in enabling such removal occurs entirely in (*i.e.*, for CWA purposes 'originates' in) Virginia, and not in North Carolina." Pet. App. 118a. For that reason, too, the Commission concluded, certification by North Carolina was not required.

In reaching its conclusions, the Commission expressly distinguished the case before it, involving an amendment to a license that authorizes water withdrawal from an existing licensed project, from proceedings "in which the Commission issues an original license to construct and operate a new hydroelectric project" or proceedings "for a new license (relicense) of the project after the original license has expired." Pet. App. 118a-119a. In cases involving original licenses or relicenses, the Commission explained, there would be a discharge at "the place * * * where the water flows from the project into the river," and Section 401(a)(1) thus would require certification by the State where the discharge occurs. *Id.* at 119a.

5. After the remand and after further briefing and argument, a divided panel of the court of appeals affirmed the Commission's conclusion that North Carolina did not have the right to certify the water supply project in connection with the license amend-

ment proceedings.[9] Pet. App. 1a-46a. In the court's view, the plain meaning of the term "discharge," as used in Section 401(a)(1), "contemplates the addition, not the withdrawal, of a substance or substances." *Id.* at 17a. Because the evidence of record showed that the operation of the pipeline project would not result in the addition of anything to the water flowing

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[9] The United States submitted a brief as amicus curiae at that time. The brief noted that Section 401(a)(1) "does not explicitly deal with amendments to licenses for activities previously subject to certification under that provision, but the structure of the statute suggests that it nonetheless contemplates that changes in a license that adversely affect the water quality of the original discharge must be examined because the amended license still authorizes the original discharge." U.S. Br. 8. That is so, the brief continued, because "an amendment permitting an activity that does not result in a direct discharge in North Carolina could still result in a change in the original discharge and have an adverse effect [o]n water quality in North Carolina." *Ibid.* The brief reasoned that "[t]he failure of the statute expressly to address such circumstances creates a gap which it is the responsibility of the administering agency to fill." *Ibid.* The brief acknowledged that FERC had filled the gap by enacting its regulation requiring certification where the license amendment would cause a "material adverse impact on the water quality in the discharge from the project." 18 C.F.R. 4.38(f)(7)(iii). Accordingly, the brief concluded, "North Carolina's 401(a)(1) rights turn on whether the amendment adversely affects the original discharge in North Carolina." U.S. Br. 10. The brief did not address whether FERC's determination that there would be no adverse effect in this case should be affirmed. Athough the brief for the United States as amicus curiae thus took no position on the ultimate disposition of this case, it did state that "[i]f the court sustains FERC on [the adverse effect] issue, then in our view the court may conclude that further certification from North Carolina is not necessary in order for the license amendment to be lawfully issued." *Ibid.*

through the dam turbines, the court sustained the Commission's determination that neither the withdrawal of water from Lake Gaston nor the reduction in the volume of water passing through the dam turbines in North Carolina would "result[] in a discharge" for purposes of that section. *Ibid.*

In the court of appeals' view, its holding in this case was not inconsistent with this Court's decision in *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700 (1994). The court stated that *PUD No. 1* presented the question whether a minimum stream flow condition imposed by the State of Washington on a dam license under Section 401(d) of the Clean Water Act, 33 U.S.C. 1341(d), was unlawful because it was "unrelated to the[] specific discharges" at issue. Pet. App. 19a (quoting 511 U.S. at 711). The court understood that the holding in *PUD No. 1* was that Section 401(d) "authorizes a state to place 'additional conditions on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.'" *Id.* at 19a-20a (quoting 511 U.S. at 712). The court therefore found *PUD No. 1* "inapposite" here, because this Court in *PUD No. 1* "never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of Section 401(a)(1)." *Id.* at 20a.

Judge Wald dissented. Pet. App. 32a-46a. Referring to the majority's assumption "that the flow of water through the power project's turbines in North Carolina is a § 401(a)(1) 'discharge,'" she reasoned that "if a State must consent before a new discharge is introduced into its waters, then a change in that discharge must require a new consent." *Id.* at 34a-35a. Judge Wald recognized that a project modification "that will

have no effect on an existing discharge, or that will have at most a *de minimis* effect on the discharge, may perhaps be granted without requiring a new certification from the State in which the discharge originates." *Id.* at 35a. But she rejected the majority's view that the only license modifications that trigger the certification right are those representing an "addition * * * of a substance or substances" to the discharge. *Id.* at 36a. In her view, the language and structure of the Clean Water Act support her conclusion, and the majority's contrary approach "threatens a congressional policy" that "States were to be put in charge of making and enforcing the crucial judgments surrounding water quality within their borders." *Id.* at 39a.[10]

7. On August 21, 1997, the court of appeals rejected petitioners' suggestions of rehearing en banc. Judges Wald and Tatel noted that they would grant rehearing en banc. Pet. App. 132a-133a.

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or otherwise raise an issue warranting further review. The petitions for a writ of certiorari should therefore be denied.

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[10] In portions of its decision not challenged in this Court, the court of appeals rejected the Commission's view that North Carolina had waived its Section 401(a)(1) certification rights, Pet. App. 9a-13a, and held that the findings underlying FERC's decision to grant the amendment were supported by substantial evidence and were not arbitrary and capricious, *id.* at 20a-31a. Judge Wald dissented in part from the majority's holding that FERC's decision was not arbitrary and capricious. *Id.* at 42a-46a.

1. Contrary to petitioners' contentions (NC Pet. 17; RRBA Pet. 11), the decision of the court of appeals does not conflict with the Fourth Circuit's decision in *City of Fredericksburg* v. *FERC*, 876 F.2d 1109 (1989), a case involving an application for a new hydropower project at a pre-existing dam. In that case, the license applicants had sent a letter to the appropriate state agency seeking a Section 401(a)(1) certification, but, because they had failed to file the forms that the state agency required, the applicants had not obtained the Section 401(a)(1) certification. FERC nonetheless granted the license, on the ground that the applicant's letter had constituted "a request for certification" under Section 401(a)(1) and FERC's own regulations, and that the State had failed to act on that request within the one-year period specified in Section 401(a)(1). 876 F.2d at 1111.

The Fourth Circuit held in *City of Fredericksburg* that FERC had erred in waiving the certification requirement in those circumstances, because the applicant "never made a 'request' for certification within the meaning of FERC's regulations." 876 F.2d at 1111. The court noted that it "rest[ed] [its] holding solely on [its] reading of the FERC regulations." *Id.* at n.1. The court's opinion does not indicate that there was any dispute between the parties regarding whether the project might result in a "discharge" under Section 401(a)(1). The opinion in *City of Fredericksburg* therefore does not mention or discuss the term "discharge" and reaches no conclusion with respect to its meaning or application—the only issues in this case. Accordingly, there is no conflict

between the decision in this case and *City of Fredericksburg*.[11]

2. North Carolina argues (Pet. 13) that "[t]here are more than one thousand hydroelectric dams in the United States, affecting untold numbers of rivers and tributaries," and that, if the decision of the court of appeals is allowed to stand, "States will be stripped of their ability to preserve water quality in one of the most critical areas of environmental concern, *i.e.*, regulation of the flow of water over hydroelectric project dams." Contrary to petitioner's contentions, the decision of the court of appeals can be expected to have a very limited impact on state certification authority under Section 401(a)(1).

Initially, the Commission's holding will have little impact on FERC-licensed hydropower projects that are located entirely within a single State, which, as RRBA concedes (Pet. 18), constitute by far the most common type of hydropower project. In such cases, Section 401(a)(1) requires state certification of federal license amendments that authorize the *construction* of water withdrawal facilities within their borders. The construction of water intake structures of

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[11] Petitioner North Carolina asserts (Pet. 17 n.9) that the Second Circuit's recent decision in *American Rivers, Inc.* v. *FERC*, 129 F.3d 99 (1997), stands for the proposition that even after a discharge is reviewed and certified under Section 401(a) of the Clean Water Act, a certifying State has an interest that must be protected if the circumstances surrounding the discharge change. *American Rivers* is inapposite, however, as the existence of a discharge resulting from the hydropower projects involved in that case was not questioned. Rather, the essence of the Second Circuit's holding was that the Commission lacks authority to review the legality of conditions on water quality certification imposed by States pursuant to CWA Section 401(a)(1) and (d). 129 F.3d at 100.

the type involved here necessarily adds substances to the water as facilities are installed in the riverbed, and such construction activities invariably create disturbances of riverbed sediment that may result in a discharge of dredge-and-fill material. See Pet. App. 118a-119a. Indeed, in this particular case, the City of Virginia Beach was required to obtain a dredge-and-fill permit from the Corps of Engineers under Section 404 of the Clean Water Act, 33 U.S.C. 1344. At that time, the State of Virginia exercised its Section 401(a)(1) certification authority with regard to the effects of both construction *and* operation of the water intake facility. See C.A. Def. App. 27-31. Had this case involved a water intake facility for a project wholly located within the State of North Carolina, therefore, North Carolina would have had a full opportunity—even under the court of appeals' decision—to exercise its Section 401(a)(1) certification authority before the applicant could obtain the necessary Section 404 permit from the Corps of Engineers.

In addition, the decision will have little effect on licenses for new hydropower projects or for which existing licenses have expired. In those cases, operation of the project results in a discharge—the flow of water back into the waterway after leaving the project impoundment or bypass facilities—that could not lawfully exist without the license. Therefore, such new licenses require certification from the State in which water flows back into the river. Pet. App. 119a. Indeed, in this very case, the license applicant will require a Section 401(a)(1) certification from North Carolina when VEPCO's current license expires in 2001. See C.A. Def. App. 3935. At that time, North Carolina may prescribe flow-related con-

ditions on the overall hydropower project pursuant to Section 401(d), 33 U.S.C. 1341(d), which permits a State to include water quality related conditions—including minimum flow requirements—in its Section 401(a)(1) certification. See *PUD No.1*, 511 U.S. at 711-712.[12] Such conditions become a condition on the Federal license, 33 U.S.C. 1341(d), and may not be altered by a subsequent federal license amendment, absent the consent of the certifying agency, the EPA, and the federal licensing agency. See 40 C.F.R. 121.2(b). North Carolina and other States may use such minimum flow conditions to protect themselves against subsequent federal license amendments authorizing water withdrawals in an upstream State.[13]

The decision of the court of appeals will also have no effect on license amendment proceedings in which FERC's own regulations require a state water quality certification. Under 18 C.F.R. 4.38(f)(7)(iii), "any application to amend an existing license * * * requires a new request for water quality certification * * * if the amendment would have a material adverse impact on the water quality in the discharge from the project." In this case, the Commission found that the withdrawal of water would not have such a "material adverse impact" on the discharge from the

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[12] The court of appeals' decision will also have little effect on hydropower projects that operate under licenses in which the State certification already imposes a minimum flow condition under Section 401(d).

[13] This case does not present any question regarding the resolution of a conflict that could develop between a State's action under Section 401(a) or (d) of the Clean Water Act and an incompatible action taken in a licensing proceeding by FERC under its Federal Power Act authority. See *PUD No. 1*, 511 U.S. at 722-723.

project in North Carolina, and it accordingly did not require the applicant to obtain certification under the regulation. But in cases in which a State's water quality is at risk—where a license amendment would have a "material adverse impact" on a project's discharge—the FERC regulation, if validly applied, cf. Pet. 14a-15a, continues to grant the State where the discharge occurs a certification right. See note 9, *supra*.

Finally, petitioners overlook the protections that continue to be afforded the States by Section 401(a)(2) of the Clean Water Act, 33 U.S.C. 1341(a)(2). That provision expressly confers upon "affected" States a non-certifying role in the licensing process, to the extent that a licensed activity is subject to Section 401(a)(1) certification by an upstream State, as it was in this case. See *Arkansas* v. *Oklahoma*, 503 U.S. 91, 103 (1992); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-491 (1987). Indeed, North Carolina itself explicitly invoked Section 401(a)(2) in 1983 during the proceedings before the Corps of Engineers on VEPCO's application for Section 404 permit, when it petitioned the Environmental Protection Agency to act on its behalf to stop the project. See C.A. Def. App. 62.[14]

3. RRBA argues (Pet. 12 n.7) that the decision below may be read to deny States the right under Section 401(a)(1) to review new National Pollutant Discharge Elimination System (NPDES) permits or NPDES permit modifications under Section 402 of

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[14] North Carolina abandoned its efforts under Section 401(a)(2) after EPA informed the State that it had "found no technical rationale which would cause this agency to object to the proposed project." C.A. Def. App. 59.

the Clean Water Act, 33 U.S.C. 1342, for activities that would result in a volume reduction of preexisting discharges. That contention is mistaken. EPA regulations require Section 401(a)(1) certifications—and thereby permit the imposition of Section 401(d) minimum flow conditions—for permitting of ongoing activities and amendments to such permits. 40 C.F.R. 122.62, 124.53, 124.55(a). Any change in the authorized discharge of pollutants that violates any condition of an NPDES permit is subject to enforcement by EPA and the States. See 33 U.S.C. 1319.[15]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[15] RRBA contends (RBBA Pet. 8, 10) that the diminished dam releases resulting from the water supply project may adversely affect water quality in North Carolina waters by lowering dissolved oxygen, causing water temperature to rise, threatening the propagation of aquatic species, and causing salt water intrusion in the lower Roanoke River. Those same claims have already been evaluated and rejected as unsupported in exhaustive opinions or reports by the Corps of Engineers, the Secretary of Commerce, and the Commission.

Nos. 97-836 and 97-839

Supreme Court, U.S.
FILED
JAN 21 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ROANOKE RIVER BASIN ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT

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AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT

The Commonwealth of Virginia, *amicus curiae* below, submits this brief in opposition to the petitions for writ of certiorari filed by the State of North Carolina and the Roanoke River Basin Association.

INTEREST OF AMICUS

The public water supply project at issue in this case is located entirely within the Commonwealth of Virginia. The City of Virginia Beach applied for and the Virginia State Water Control Board granted a Clean Water Act (CWA) § 401 certification for this public water supply project in 1983; the certification authorizes the discharge of construction materials into Lake Gaston to build the City's water intake. North Carolina now seeks to invalidate that certification. Virginia participates here to defend its § 401 authority and the validity of its certification, and to protect its traditional authority, specifically preserved in CWA § 101(g), 33 U.S.C. § 1251(g), "to allocate quantities of water within its jurisdiction" to meet those vital public water supply needs.

Virginia also is vitally interested in the safety and adequacy of public water supplies for its citizens, businesses, and the critical U.S. military facilities in southeastern Virginia. The Virginia General Assembly has allocated 60 million gallons of water per day ("60 mgd") from the flow of the Roanoke River in the Commonwealth to public water supplies for Virginia Beach and

other communities in southeastern Virginia. 1992 Va. Acts, Ch. 812, Enactment 3 (at page 1305). North Carolina's assertion of § 401 authority over Virginia Beach's project is a direct attack upon Virginia's authority and upon its allocation of water within the Commonwealth.

Virginia Beach's Lake Gaston pipeline project and earlier, similar proposals have been studied, in incredible and redundant detail, for *more than twenty years*. Those studies have concluded *unanimously* that the project is needed, that it will have *no* significant environmental impacts, and that it is the best (and probably only) available project to meet current and projected public water supply needs. The administrative and judicial record flatly contradicts North Carolina's obstructive and disingenuous contention that the project threatens water quality in the lower Roanoke River.

The pipeline project is complete and operational. A decision now to give North Carolina a § 401 veto would lead to a public water supply crisis throughout southeastern Virginia, an area that is home to nearly one million people, to port facilities that are critical to the national economy, and to the largest naval complex in the entire free world – all of which depend on local public water supplies. It also would work an utterly useless and indefensible forfeiture of $150 million of municipal funds that the Cities of Virginia Beach and Chesapeake have spent to build the pipeline project; and it would force Virginia Beach and Chesapeake "back to the drawing board," after fifteen years spent obtaining and defending the necessary permits for the project, leaving them with *no* viable alternative water source anywhere in view. That

result would be especially unconscionable in view of the fact that North Carolina asserted the § 401 claim that it presses here for the *first time* in *1994*, as an act of desperation, after it had opposed Virginia Beach's project for nearly *eleven years* and lost at every step of the way (*see* n.7, *infra*); and in view of the fact that North Carolina's opposition is motivated by the sort of abject parochialism that Congress sought to avoid by including subsection (a)(2) in § 401. Virginia participates as *amicus* in an effort to prevent this drastic harm to the important public interests that are served by the Lake Gaston pipeline.

BACKGROUND

The Court of Appeals for the Fourth Circuit summarized the background of this case, in part, in *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 598-99 (4th Cir. 1991):

> Although the City of Virginia Beach, which is the most populous city in the State of Virginia, borders the lower Chesapeake Bay and the Atlantic Ocean, it has for many years suffered from fresh water shortages. At various times in the past decade, water-use restrictions and water rationing have been imposed, and with the unexpectedly rapid population growth of the Virginia Beach community, the shortage grows more severe. Virginia Beach does not have a water supply of its own, and it has had to purchase its water from the City of Norfolk under a contract that obligates Norfolk only to provide Virginia Beach with "surplus" water

> . . . . After exploring various options for alleviating the problem, such as desalination of sea water and wastewater reuse, Virginia Beach concluded that the best solution was to draw water through a pipeline from Lake Gaston. [Footnote omitted.]

Lake Gaston is a FERC-licensed hydropower project owned by Virginia Electric and Power Company (a/k/a VEPCO or Virginia Power), and was created by construction of a dam on the Roanoke River. It lies immediately downstream of the federal Kerr Reservoir, which is "the largest of the three lakes and is the primary storage facility in the system." *North Carolina v. Hudson*, 731 F. Supp. 1261, 1264 (E.D.N.C. 1990), *aff'd*, *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992). Roanoke Rapids Reservoir, another VEPCO facility, lies immediately below Lake Gaston. Below Roanoke Rapids, the River flows 138 miles through Piedmont and coastal North Carolina and into Albemarle Sound.

The Virginia State Water Control Board's § 401 certification limits Virginia Beach's water withdrawals from Lake Gaston to a maximum of 60 mgd. Sixty mgd is a mere 1.2 percent of the average flow of the Roanoke River. Virginia Beach's § 404 permit[1] and VEPCO's FERC

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[1] *See* 33 U.S.C. § 1344. Virginia Beach's § 404 permit was affirmed after eight long years of litigation brought by the State of North Carolina and the Roanoke River Basin Association, petitioners here. *See State of North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987) (*Hudson I*), and 731 F. Supp. 1261 (E.D.N.C. 1990) (*Hudson II*), *aff'd*, *Roanoke River Basin Ass'n v. Hudson* (*Hudson III*), 940 F.2d 58 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992).

license amendment (the action challenged here) both preclude the City's withdrawals from ever causing a reduction of the instantaneous minimum reservoir releases mandated by VEPCO's current or future FERC license. Those instantaneous minimum releases are a key datum used by North Carolina in issuing pollution discharge permits, and continued maintenance of the instantaneous minimum releases assures protection of water quality in the lower Roanoke River, including compliance with North Carolina's water quality standards (assuming, of course, that North Carolina does not allow more pollution than the River can bear). *See North Carolina v. Hudson (Hudson I)*: "in regulating water quality through the National Pollution Discharge Elimination System, North Carolina determines the maximum pollutant discharges allowable by industries and municipalities in the river based on FERC regulated minimum flows. . . . "; Secretary of Commerce Decision and Findings, Mat 19, 1994, DA 1727: "pollution discharge permits are keyed to minimum flows, and VEPCO's minimum flows will not be affected by the City's project. . . . A 1978 [North Carolina North Carolina Division of Environmental Management] study reported that 'the potential for overall development, fishery maintenance, and *water quality conditions* on the lower Roanoke River are *directly related to the minimum flow requirements*'" (emphases added).[2]

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[2] "DA" citations are to the "Deferred [Joint] Appendix" filed by the parties in the Court of Appeals.

ARGUMENT

This case comes at (or at least near) the end of a protracted State-*versus*-State battle over the use of a common resource – a river whose watershed is mostly in Virginia, but which flows to the ocean through North Carolina. The Petitions for *Certiorari*, however, attempt to obscure or conceal what really is at stake, by pretending that the issue is "State-*versus*-Federal" when in fact the real controversy is between two States.[3]

This Court has seen other such battles over inter-basin water transfers to supply the growing needs of our great coastal population centers. *See New Jersey v. New York*, 283 U.S. 336 (1931) (water supplies for New York City from the Delaware River); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (water supplies for Boston from the Connecticut River basin). The applicable law has long been settled: such inter-State disputes are governed by the principle of "equitable apportionment." As the

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[3] In the Court of Appeals a number of other states filed *amicus* briefs in support of North Carolina. Some may do so in this Court. These states were apparently misled into believing that this dispute is one between a state and a federal agency such as that recently decided by the United States Court of Appeals for the Second Circuit in *American Rivers, Inc. v. FERC* (Docket Nos. 96-4110(L), et al. – November 5, 1997), 1997 U.S. App. Lexis 30372. Nothing could be further from the truth. The Commonwealth, which takes second place to no state in protecting its sovereignty from interference of any sort, has no quarrel with the *American Rivers* decision that FERC cannot simply reject conditions imposed by a state under Section 401 of the CWA. The present case, however, does not present that issue. The case is a bald effort by North Carolina to misuse the CWA to intrude into the internal affairs of Virginia.

Court has stated repeatedly, beginning with the decision which first established that principle, interstate rivers must be shared; there must be an "equitable apportionment of benefits between the two states resulting from the flow of the river." *Kansas v. Colorado*, 206 U.S. 46, 118 (1907).

Justice Holmes, writing for a unanimous Court (with two Justices not participating), described the equitable apportionment principle and the necessity that gave rise to it in *New Jersey v. New York*, 283 U.S. at 342-43:

> A river is more than an amenity, it is a treasure. It offers *a necessity of life that must be rationed among those who have power over it*. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand *equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished*. Both States have real and substantial interests in the River that must be reconciled as best they may be . . . [T]he effort always is to secure an equitable apportionment without quibbling over formulas. [Emphases added.]

See also, e.g., Colorado v. Kansas, 320 U.S. 383, 393 (1943): "The lower State is not entitled to have the stream flow as it would in nature regardless of need or use."

In making equitable apportionments of the benefits of interstate rivers, the Court has recognized repeatedly that public water supply for human consumption is "the

most beneficial use" available. *New Jersey v. New York*, 283 U.S. at 343.[4]

- "Drinking and other domestic purposes are the highest uses of water. An ample supply of wholesome water is essential". *Connecticut v. Massachusetts*, 282 U.S. at 673.

- "In *Connecticut v. Massachusetts* we declined to enjoin Massachusetts' proposed diversion for future uses. We took into account the impending 'serious water shortage' in the Boston area and the absence of 'real or substantial injury or damage' to Connecticut." *Colorado v. New Mexico*, 459 U.S. 176, 187 n.12 (1982).

- In the context "of a proposed diversion in one State to satisfy a demonstrable need for a potable supply of drinking water[,] . . . the compelling nature of the proposed use reduces the speculation that might otherwise attend assessment of the benefits of a proposed diversion." *Colorado v. New Mexico*, 459 U.S. at 193-94 (O'Connor, J., concurring in the judgment).

Congress manifestly did not alter or pre-empt this pre-existing body of law by enacting the CWA, and to our knowledge no party has ever contended that it did. To the

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[4] The quoted statement is in the Court's discussion of a New Jersey argument that mirrors North Carolina's one consistent complaint against the Lake Gaston pipeline, that it is an "interbasin transfer" and therefore permanently reduces the River's flow by the amount of the withdrawals. In *New Jersey v. New York*, the Court answered that argument in this way: "The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. . . . " *See also Connecticut v. Massachusetts*, 282 U.S. at 669-71.

contrary, Congress *expressly preserved* each State's existing jurisdiction and authority to allocate its water resources among competing users, from *any* encroachment under the CWA. It did this first in its statement of policies and purposes, in CWA § 101(g), 33 U.S.C. § 1251(g):

> It is the policy of Congress that *the authority of each State to allocate quantities of water within its jurisdiction* shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate *rights to quantities of water which have been established by any State.* [Emphases added.][5]

Congress reiterated this principle in CWA § 510(2), 33 U.S.C. § 1370: "Except as expressly provided in this Act, nothing in this Act shall . . . (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." As the Court stated in *P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511

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[5] The policy stated in § 101(g), which was added to the CWA in 1977, also is reflected in § 101(b), 33 U.S.C. § 1251(b), which states "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the *development and use* (including restoration, preservation, and enhancement) of land and *water resources.*" (Emphases added.) Section 101(g) speaks more specifically to the preservation of the States' existing authority to "allocate quantities of water" and to establish "rights to quantities of water" within their jurisdiction – as Virginia has done in this instance. *See* 1977 legislative history, *quoted in P.U.D. No. 1*, 511 U.S. at 721: "It is the purpose of this amendment to insure that State [water] allocation systems are not subverted. . . . "

U.S. 700, 720 (1994): "Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users."

Congress also tailored § 401 carefully to preserve each State's authority over its own water resources and to prevent possible abuses of the certification power. Indeed, Congress very likely foresaw the risk that downstream States might misinterpret or attempt to misuse their § 401 certification authority to seize power over their neighbors' resources, or as a weapon in interstate competition for business, industry, and the like,[6] and it

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[6] North Carolina's opposition to Virginia Beach's project has been fueled by economic rivalry from its inception. Before 1983, North Carolina's environmental experts admitted repeatedly that Lake Gaston withdrawals would not harm downstream areas. North Carolina officials have even admitted, on occasion, that their primary concern is not environmental protection but preservation of 100% of the River's water for some undefined potential future uses in North Carolina. In a June 13, 1992, U.S. Department of Commerce public hearing (*see* n.7, *infra*), for example, North Carolina's Governor argued at length that the project should not be allowed on the ground (which every responsible federal agency has rejected) that "[t]he citizens in this area would be deprived of possible jobs and increased income that follows industrial development if our water resource is pilfered by our neighbors." Hearing transcript at 163. *See also, e.g., Hudson III*, 940 F.2d at 66: "North Carolina's objection appears to be that if Virginia Beach builds the pipeline, then 60 million gallons of water a day will be unavailable for future use in North Carolina at some point in the far future"; *North Carolina v. Virginia Beach*, 951 F.2d, at 598: "North Carolina and the Roanoke River Basin Association . . . oppose the proposed diversion of water from the Roanoke River Basin, because they argue it will create a potential shortage there and stifle future development in the basin."

enacted § 401(a)(2) specifically to protect both upstream and downstream States from possible abuses by their neighbors.

Section 401(a)(2) does not give any State a certification or veto power over activities in other States, as North Carolina seeks in this case. Instead, it interposes a neutral federal arbiter, the Administrator of the U.S. EPA, to referee interstate conflicts over federally-regulated discharges affecting interstate waterways. Section 401(a)(2) provides, in part, that whenever the Administrator determines that a discharge which originates in one State "may affect . . . the quality of the waters of any other State," that other State may object to the issuance of a federal permit, thereby requiring the federal licensing or permitting agency (such as FERC or the Corps of Engineers) to hold a public hearing. The licensing agency then must either "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements" or deny the permit. 33 U.S.C. § 1341(a)(2). *See Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992): "Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured." *Cf. id.*, at 104-07 (upholding an EPA regulation requiring "compliance with the applicable water quality requirements of all affected States" as a reasonable interpretation of § 401).

Section 401 thus employs different methods to protect water quality, depending on the locus of the discharge: An "originating" State's traditional jurisdiction over its own resources is preserved by the requirement

that it certify compliance with its water quality standards. "Affected" downstream States acquire no jurisdiction over other States' resources, but they may object to activities in other States and appeal to the federal government to intervene – precisely as they should do, in a federal system.

North Carolina understands quite well that its remedy, if any, is under § 401(a)(2). It invoked that remedy in 1983, but EPA frustrated that effort by declining to make the necessary finding that the project "may affect" water quality in North Carolina.

North Carolina's current theory, that Virginia Beach's withdrawals will result in a "new discharge" at the Gaston and Roanoke Rapids Dams, which "originates" in North Carolina, is contrary to the facts of this case (*see Virginia Electric and Power Company*, 77 F.E.R.C. ¶ 61,138, at 61,519-20 (1996), *reprinted in* North Carolina's Petition for *Certiorari* at 118a-122a). That theory also would swallow § 401(a)(2) and render it useless. As FERC stated (*id.*, at 61,521-22, North Carolina Petition at 127a), North Carolina argues that it "can control *any* alteration in the amount of water it receives from an upstream state," and it seeks to use the CWA "to frustrate the ability of an upstream state to allocate in-state water to meet public consumptive needs within that upstream state."

Section 401(a)(1) unambiguously commands the result reached by the Court of Appeals. Petitioners argue at length that the Court of Appeals erred by giving the word "discharge" its plain meaning of "addition," but they ignore the context in which the word appears. Section 401(a)(1) requires the originating State's certification

for federally licensed activities "which may result in any discharge *into the navigable waters.*" 33 U.S.C. § 1341(a) (emphasis added). Petitioners have not explained how a "discharge into" navigable waters can be accomplished *without* adding something to those waters.

There can be no reasonable doubt that *any* discharges into the navigable waters that may result from Virginia Beach's project originate in Virginia. Indeed, the *only* such discharge is the City's discharge of construction materials into Lake Gaston. But the same would be true even if petitioners correctly argued that an "altered discharge" of water through a dam is a "new discharge" and requires a new certification. The "altered discharge" undeniably "originates" in Virginia, the locus of the water intake that causes the "alteration."

In *P.U.D. No. 1*, 511 U.S. 700, the Court addressed the scope of the States' certification authority under §§ 401(a) and 401(d). That case, however, presented no issue of whether § 401 applied, which of two or more competing States had certification authority, or the effect of § 401(a)(2). *See id.* at 711. The Court addressed those issues in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); and until North Carolina belatedly (in 1994) concocted the § 401 theory that it presses here,[7] it appeared that *Ouellette* had settled the matter.

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[7] Since 1983, North Carolina has opposed Virginia Beach's proposal by virtually every conceivable means (and its leaders have frequently proclaimed to its people that they were doing so). Yet in the nine years (1982-1991) consumed by the § 404 permit process and the *Hudson* litigation, North Carolina never suggested that it had *any* § 401 certification authority over the project. Virginia Beach and VEPCO initiated pre-application

In *Ouellette* the Court expressly recognized that where a discharge originates in one State but may affect water quality in another (as allegedly is the case here), the affected State is protected by § 401(a)(2) but not by § 401(a)(1). *See* 479 U.S. at 490:

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, *the affected State only has an advisory role* in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given

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consultation for the FERC license amendment in early 1990 and filed a formal application in February 1991. North Carolina promptly objected under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A), preventing a FERC approval (pending an appeal to the U.S. Secretary of Commerce, *see id.*) and stalling the FERC process for nearly three years. The Secretary of Commerce ultimately reversed North Carolina's objection and removed the obstacle to FERC approval of the pipeline project, after concluding, *inter alia*, that **"the project meets the requirements of the Clean Water Act"** (Secretary of Commerce Decision and Findings, DA 1667 (emphasis in original); *see North Carolina v. Brown*, 42 E.R.C. 1255, 1258 n.3 (D.D.C. 1995)) – as the Secretary *must* do, before reversing a State CZMA objection to a federal license or permit. *See* 15 C.F.R. § 930.121(c). North Carolina sued to set aside the Secretary's decision (*see North Carolina v. Brown, supra*); but it did not claim at *any* time in the entire CZMA ordeal that the City's project (or the VEPCO license amendment) required its certification under the CWA. It made that claim for the *first time* in a motion filed with FERC in May 1994 – nearly eleven years after it first opposed Virginia Beach's project, and more than three years after the FERC application was filed.

> notice and the opportunity to object to the proposed standards at a public hearing. 33 U.S.C. § 1341(a)(2). . . . Significantly, however, *an affected State does not have the authority to block the issuance of the permit*. . . . An affected State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program. [Emphases added.]

The Court also explained that Congress chose this regulatory scheme in order to avoid exactly the sort of interstate conflict presented by this case: "For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." 479 U.S. at 496, *quoting Illinois v. Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). The Court concluded:

> It is unlikely – to say the least – that Congress intended to establish such a chaotic regulatory structure.
>
> *Nothing in the Act gives each affected State this power to regulate discharges.* The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA. This delineation of authority represents Congress' considered judgment as to the best method of serving the public interest and reconciling the

> often competing concerns of those affected by the pollution.

Id. at 497 (emphasis added).

The language that Congress chose to effectuate its intent is clear. Section 401 requires certification *only* from the State where the activity occurs that "originates" a "discharge into the navigable waters" (the "source" State). Downstream "affected" States are protected by § 401(a)(2), with the intervention of the EPA as a neutral federal arbiter. In this case, Virginia Beach's water supply intake in Virginia is the "origin" of any arguable discharge, change in discharge, or reduction of discharge; and *only* Virginia has § 401(a)(1) certification authority. North Carolina is protected by § 401(a)(2). North Carolina has pursued that course, and, as contemplated by the statute, the EPA as neutral federal arbiter has refused to find that water quality in North Carolina will be affected by Virginia Beach's project in Virginia. Section 401 is satisfied.

CONCLUSION

North Carolina is trying to misuse § 401 to take away Virginia's "authority . . . to allocate quantities of water within its jurisdiction" – *i.e.*, in Virginia, and within its equitable share of the Roanoke River – and to seize that authority for itself, contrary to the express command of CWA § 101(g). Indeed, North Carolina's fundamental argument – that the "discharge" resulting from Virginia Beach's project is the *reduction in flow* through the

downstream dams – is a *direct attack* on Virginia's authority to allocate quantities of water within its jurisdiction.

North Carolina contends implicitly that *regardless* of whether it could establish in an equitable apportionment action that it (and not Virginia) has jurisdiction to allocate the disputed 1.2% of the River's flow among competing users (which appears highly unlikely, perhaps accounting for North Carolina's failure to bring such a claim), its § 401 authority supersedes and abrogates Virginia's authority to allocate quantities of water within Virginia. In fact, acceptance of North Carolina's argument in this case would allow it to use § 401(a)(1), contrary to §§ 101(g), 510(2), *and* 401(a)(2), to negate a Virginia statute (1992 Va. Acts, Ch. 812, Enactment 3, *reprinted as* Addendum 1) that "allocate[s] quantities of water within its jurisdiction" for public water supplies in southeastern Virginia.[8]

Section 401(a)(2) serves North Carolina's interest in protecting its water quality from adverse impacts of activities upstream in Virginia. North Carolina has no legitimate need to torture § 401(a)(1) to serve that interest, and its only apparent reason for doing so is to seize control of water in Virginia. Virginia, on the other hand, can look *only* to § 401(a)(1) for protection against adverse water quality impacts of activities licensed or permitted

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[8] In Enactment 3, the Virginia General Assembly expressly "allocated" 60 mgd "from the flow of the waters of the Roanoke River in the Commonwealth [of Virginia] . . . for the development of an additional public water supply by the City of Virginia Beach to provide water for itself and other communities in the southeastern region of the Commonwealth."

by federal authorities. Unlike North Carolina, the State *downstream* of the discharge of construction materials into Lake Gaston, Virginia has *no* protection under § 401(a)(2).

As discussed above, *Ouellette* establishes that Congress did not intend for "a number of different states to have independent and plenary regulatory authority over a single discharge." 479 U.S. at 496. If North Carolina were to succeed in usurping Virginia's § 401(a)(1) certification authority, then § 401 would give Virginia, the State where all relevant activities occur, no protection at all. That simply is not the law. It is a grossly twisted and distorted view of § 401 that North Carolina has adopted to stop the sorely needed public project, across the state line in Virginia – a project that North Carolina repeatedly acknowledged (before 1983) would cause no harm to its interests at all.

Thus it is clear that the Court of Appeals correctly decided this case, and the Court should deny *certiorari*.

Respectfully submitted,

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FILED
JAN 21 1998
CLERK

RECEIVED
HAND DELIVERED
JAN 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

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INTEREST OF *AMICI CURIAE*

The States are the primary stewards of the waters within their borders. *See* 33 U.S.C. § 1251(b) (Pet. App. 137a). They are responsible for ensuring that water of sufficient quality is available for a variety of essential uses, such as human consumption, plant and wildlife habitat, irrigation, industrial and economic development, and recreation. Each

State has developed a complex scheme of statutory and regulatory water quality standards and devotes substantial resources to implement its water policy.

Section 401 of the Clean Water Act ("CWA") is the principal and most effective tool the States possess to implement their water quality standards during federal license proceedings, including Federal Energy Regulatory Commission ("FERC") hydroelectric license proceedings. *See* 33 U.S.C. § 1341 ("Section 401") (Pet. App. 185a-189a). To protect water quality, Section 401 authorizes the States to veto federally licensed projects or to impose on those projects conditions more stringent than federal law requires. *See, e.g., American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997); *see also Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

The decision of the Court of Appeals wrongfully arrogates to the federal government the States' authority to assure compliance with State water quality laws. It permits FERC to approve amendments to licenses which will add pollution to water without State consent; and it offends fundamental principles of federalism within a critical subset of federal license proceedings.

SUMMARY OF ARGUMENT

The Court of Appeals' misconstruction of Section 401 will impact virtually every State. Its decision renders States powerless to impose necessary water quality conditions on FERC-licensed activities that could dramatically alter the flow, dissolved oxygen content, temperature, and other characteristics of a river, simply because those activities do not "add" a "substance" to the water. The decision further ignores and conflicts with *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) ("*PUD No. 1*").

ARGUMENT

A. THE COURT OF APPEALS' MISCONSTRUCTION OF SECTION 401 WILL HAVE PROFOUND ADVERSE IMPACTS ON STATE POWER AND RESPONSIBILITY TO PROTECT WATER QUALITY

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (Pet. App. 136a). At its outset, the CWA provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(b) (Pet. App. 137a).

In order to achieve these objectives, Congress enacted Section 401, which authorizes a State to review federally licensed projects that "originate[]" or "will originate" a "discharge" within that State. 33 U.S.C. § 1341(a)(1) (Pet. App. 185a). If a State determines that a project will not comply with its water quality laws, it may either veto the project or impose conditions relating to water quality which the federal agency *must* incorporate in the license. *See* 33 U.S.C. § 1341(d) (Pet. App. 189a); *Keating*, 927 F.2d at 622. A State is free to impose more stringent conditions than federal law requires. *Keating*, 927 F.2d at 622.

Through Section 401, the States routinely prescribe conditions for FERC-licensed dams, such as minimum flow requirements, to ensure that downstream waters are not harmed by man-made alterations to the hydrologic system. *E.g.*, *PUD No. 1*, 511 U.S. at 700; *American Rivers*, 129 F.3d at 102-05.

Dams such as those licensed by FERC can dramatically impact water quality downstream from a project:

> The river emerging from a dam is not the same river that entered its reservoir. That new river may be hotter or colder. Its daily discharge may

> vary wildly, while its seasonal pattern of high spring floods and low winter flow may be inhibited beyond recognition. Suddenly starved of its sediment load, the clear waters of a river below a dam may scour its bed and banks. An entirely new succession of riparian plants and animals may move into the river and valley below a dam. Native fishes may die or be severely stressed.

Michael Collier, *et al.*, U.S. Geological Survey, Circular 1126, *Dams and Rivers: A Primer on the Downstream Effects of Dams* at 7 (1996); *see id.* at 1 ("regulated rivers are fundamentally different ecological and physical entities from untamed rivers"). Regardless of how stringently a State controls other sources of pollution in a given river system, poor management of a dam may profoundly degrade water quality. It is imperative that the States retain sufficient regulatory authority over dams to preserve overall water quality.

The Court of Appeals decision wrongfully prevents the States from reviewing, conditioning, and/or certifying any federally licensed changes to the operation of and discharge of water from more than one thousand hydroelectric dams in the United States unless the changes involve the "addition" of a "substance" to the navigable waters. *See* Pet. App. 17a-20a. The consequences of this shift in power from the States to the federal government will be severe and irreversible. A FERC license may, and often does, last for fifty years. *See* 16 U.S.C. §§ 799 & 808(e). During that time, the licensee may, and often does, seek to amend its license. *See, e.g., Bellows-Tower Hydro, Inc.*, 79 FERC ¶ 62,183 (1997) (eliminating minimum flows because aesthetics no longer priority at project site); *Alabama Power Co.*, 79 FERC ¶ 62,182 (1997) (modifying flow releases to accommodate recreational interests).

As a result of a license amendment, the discharge from a dam can be altered substantially, and the downstream water polluted, without the "addition" of a "substance" to the water. For example, a licensee could install new pumps at an existing water intake facility in a FERC-licensed reservoir to significantly increase the pumping rates at that facility -- indeed, to pump the lake dry. Or a licensee could change from run of river operation, in which the discharge from the project approximates the inflow, to peaking operation, in which the discharge is determined by power needs, which fluctuate greatly from hour to hour. In either case, the change could decimate fish and wildlife, destroy recreation, and impact industry adversely. Yet neither change would add a substance to the water; and, therefore, under the Court of Appeals decision, the host State would have no Section 401 certification rights to address the threat to water quality.

B. THE COURT OF APPEALS DECISION IS INCONSISTENT WITH THIS COURT'S RULING IN *PUD NO. 1 OF JEFFERSON COUNTY V. WASHINGTON DEPARTMENT OF ECOLOGY*

In *PUD No. 1,* this Court made the following fundamental observation regarding the scope of the CWA and of State authority under Section 401:

> Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or . . . as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute

> water pollution. . . . [The CWA] expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams."

PUD No. 1, 511 U.S. at 719-20 (citation omitted). Thus, the CWA and Section 401 embody a "broad conception of pollution," *id.* at 719, including, as here, a reduction in water quantity flowing over a dam as a result of the issuance by FERC of a license amendment.

The Court of Appeals disregarded this Court's ruling in *PUD No. 1*. In holding that an alteration of an existing discharge is not "any discharge" within the meaning of Section 401, the Court of Appeals put beyond the reach of the States exactly the types of changes to water quality that this Court held were within the scope of the CWA. In short, the decision of the Court of Appeals eviscerates *PUD No. 1*.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of the State of North Carolina should be granted.

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No. 97-836

(6)

Supreme Court, U.S.
FILED
FEB 2 1998
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER NORTH CAROLINA

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In The
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---

REPLY BRIEF FOR PETITIONER NORTH CAROLINA

The brief of the federal government in opposition is remarkable in a number of respects. The government's arguments do not defend the court of appeals decision and do not address this Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) ("*PUD No. 1*"). Rather, the government argues that this Court should accept the decision below on an alternative legal theory, which was abandoned by the Federal Energy Regulatory Commission ("FERC") and rejected by the court of appeals.[1] The government concedes the comprehensive and

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[1] While intervenor Virginia Beach and *amicus* Commonwealth of Virginia pay lip service to the court of appeals decision, they too oppose certiorari on grounds unrelated to the decision below.

sweeping scope of the state certification authority that the Petition asks this Court to restore, but argues that the impact of the exception created in this case is too limited to require correction. In so arguing, however, the government ignores the fact that 21 States have filed an *amicus* brief in support of North Carolina's Petition and that 40 States supported North Carolina below because of the decision's obvious sweeping consequences under the Clean Water Act ("CWA").

ARGUMENT

I. THE GOVERNMENT ALL BUT CONCEDES THAT THE COURT OF APPEALS DECISION IS WRONG

The federal government utterly fails to support or even address the court of appeals' holding that North Carolina had no certification rights under CWA Section 401(a)(1), 33 U.S.C. § 1341(a)(1) ("Section 401(a)(1)"), because the activity authorized by the license amendment would not add a "substance" to the water. Rather, the federal government argues that the result below should not be disturbed because the license amendment approved by FERC will not have a "material adverse impact" on the water quality in the discharge from the Hydro Project. Brief for FERC ("FB") at 15-16.[2] Although FERC relied on that theory in its initial decision (Pet. App. 67a), FERC abandoned that position after the interim remand from the court of appeals, proposing instead the "substance adding test" ultimately adopted by the court of appeals (Pet. App. 115a).

The court of appeals not only recognized that FERC had "discarded" its initial position as a basis for its decision, but expressed "serious reservations" about its "legality." Pet. App. 14a-15a.

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[2] This argument is based on a FERC regulation (18 C.F.R. § 4.38(f)(7)(iii)) which purports to permit FERC to waive the statutory certification requirement when it finds that a license amendment will not have a material adverse impact on the discharge.

The government has offered no basis for avoiding the important issue of law raised by the decision below -- the correctness of the court of appeals' holding that state certification of license amendments is required only when there is an "addition . . . of a substance" to water. Pet. App. 17a. Moreover, both the decision of the court of appeals and the position of the government are inconsistent with the position of the Environmental Protection Agency ("EPA"), the agency charged with administering the CWA.[3]

II. THE GOVERNMENT'S CLAIM THAT THE DECISION BELOW "CAN BE EXPECTED TO HAVE A VERY LIMITED IMPACT ON STATE CERTIFICATION AUTHORITY" IS PATENTLY SPECIOUS

The government argues that the reach of the decision below is likely to be limited because most hydroelectric projects are situated entirely within one State and the circumstances of multi-state involvement under the CWA will be rare. FB at 13-14. This suggestion is unfounded. The rule of law articulated by the court of appeals is not limited to multi-state hydroelectric projects. Moreover, the dam and all FERC-authorized hydroelectric facilities in this case *are* located entirely within one State -- North Carolina. The only pertinent activity occurring in Virginia is the construction of an intake facility 300 yards from the North Carolina border designed to draw water from the impoundment in North Carolina created by the dam.

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[3] EPA initially advised the court below that it was "unquestionable" that Section 401(a)(1) applied to the instant license amendment and that North Carolina had certification rights with respect thereto. App. 5a. Even after the filing of the United States' *amicus* brief below, EPA continued to urge that it is "essential" that license amendments be subject to the CWA "to ensure that amendments to federal licenses or permits are not used as a mechanism to avoid State certification of changes to federally-licensed activities." App. 11a.

What concerns North Carolina and the *amici* States is the broad notion that FERC can, through license amendments, authorize changes in the operation of hydroelectric facilities and modify the flow of waters in a State without allowing that State to determine whether the altered discharge is consistent with State water quality requirements.[4] This concern is not limited to water withdrawal projects. There are many other types of activities requiring license amendments (such as changes to the operating parameters of power generation facilities) which are implicated by the court of appeals' far-reaching decision and which have critical impacts on water quality.[5] *See* Brief for *Amici Curiae* States of Oklahoma, *et al.* at 5.

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[4] The Commonwealth of Virginia incorrectly attempts to characterize this case as a pitched battle between two States, arguing that North Carolina is attempting to "invalidate" the certification issued by Virginia in connection with the Corps of Engineers ("COE") permit authorizing construction of Virginia Beach's intake facility and pipeline. Amicus Curiae Brief of the Commonwealth of Virginia ("VB") at 6, 1. Nothing could be further from the truth. North Carolina does not seek to invalidate Virginia's certification; it merely seeks to enforce its own certification rights triggered by the discharge over the dam in North Carolina. As North Carolina has repeatedly made plain, its concern is with the federal usurpation of North Carolina's certification authority.

[5] Virginia Beach's argument that reversing the decision below will create a nightmare scenario of multi-state certification requirements (Brief for the City of Virginia Beach at 13) is a red herring. North Carolina is not a remote downstream State seeking certification rights relative to modification of a hydroelectric facility in an upstream State. What is at issue in this case is North Carolina's Section 401(a)(1) rights relative to a withdrawal of water directly from a lake created by a hydroelectric dam in North Carolina. It is legally irrelevant that the intake structure is built 300 yards north of the border in a small, tidal tributary which, were it isolated from Lake Gaston, would contain only a minute fraction of the water being withdrawn.

Hydroelectric licenses typically have long terms, here 50 years. Many are amended during their term. Contrary to the government's suggestion, the States are plainly not protected by their ability to impose conditions in licensing and relicensing proceedings. Unless a State has perfect prescience at the time of licensing as to all potential amendments that might be proposed, it is powerless, under the decision below, to avail itself of any of the protections intended by Section 401(a)(1) during the long period of the license. For this reason, the government's correct assertion (FB at 15) that a State-imposed condition may not be modified without State consent is irrelevant.

III. THE GOVERNMENT'S CLAIM THAT THE COURT OF APPEALS DECISION DOES NOT CONTRADICT GOVERNING PRECEDENT IS ERRONEOUS

Aside from an introductory statement that the lower court's decision "does not conflict with any decision of this Court" (FB at 11), the government never makes any argument of its own addressing the conflict between the decision below and this Court's decision in *PUD No. 1*. Virginia Beach attempts to do so but misstates North Carolina's reliance on *PUD No. 1*. Brief for the City of Virginia Beach ("VBB") at 17-19.

North Carolina has never contended that *PUD No. 1* directly addresses whether a State has Section 401(a)(1) certification rights only if a "substance" is added to an existing discharge. North Carolina contends that the holding in *PUD No. 1* is predicated on the fact that the discharge of water from a hydroelectric dam is a "discharge" within the meaning of Section 401(a)(1). Petition at 14-16. Virginia Beach (like the court of appeals) concedes that additions in flow affecting a discharge trigger certification rights, but argues that *PUD No. 1* stands for the proposition that reductions in flow do not because reductions in flow are not themselves discharges.

VBB at 17-18. North Carolina's point is that *PUD No. 1* explicitly states that *reductions* in flow can affect water quality in the same way as *additions* to flow. Therefore, just as additions of water to an existing hydroelectric discharge trigger certification rights, so must reductions.

The government does address the conflict with *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109 (4th Cir. 1989) (FB at 12-13), as does Virginia Beach (VBB at 14-15). Here too, the response is ineffective. The government characterizes *Fredericksburg* as a narrow decision upholding a FERC regulation requiring that an applicant request certification from a State using the State's designated procedures. What the government ignores is that the regulation would not have been at issue had the State not had Section 401(a)(1) certification rights. Thus, the Fourth Circuit's holding was predicated upon the existence of certification rights in a case analogous to this case, where there was a *reduction* in flow over an existing dam. Virginia Beach's claim that *Fredericksburg* "does not even identify the discharges that triggered the certification requirement" (VBB at 14) is disingenuous; the court made clear, 876 F.2d at 1111, that it was the alteration in flow over the existing dam which gave rise to the certification requirement.[6]

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[6] Virginia Beach's arguments that North Carolina is barred from exercising its certification rights by the doctrines of *res judicata* and collateral estoppel because North Carolina did not raise the certification issue in proceedings before the Secretary of Commerce (VBB at 22-24) are not before this Court because they were not raised below. The argument that was raised below -- that North Carolina waived its Section 401(a)(1) rights in proceedings before the COE -- was properly rejected by the court of appeals. Pet. App. 12a-13a.

IV. THERE IS NO BASIS FOR THE GOVERNMENT'S ATTEMPT TO CARVE A NARROW EXCEPTION OUT OF THE CLEAN WATER ACT'S STATE CERTIFICATION REQUIREMENT

The government candidly concedes the comprehensive nature and broad reach of Section 401(a)(1), but argues that the narrow exception found by the court of appeals should remain unreviewed. The government acknowledges that (i) Section 401(a)(1) certification is required in *all* hydroelectric project licensing and relicensing proceedings, because the flow of water over the dam results in a discharge; (ii) States can impose conditions at licensing and relicensing that may not be modified by a subsequent license amendment and thus may effectively protect against subsequent water withdrawals; (iii) States have certification rights under FERC's regulation whenever FERC decides that a license amendment will have a material adverse impact; (iv) Section 401(a)(1) certifications are required for EPA permits and permit amendments, including "activities that would result in a volume reduction of preexisting discharges"; and (v) even "downstream" States are protected under Section 401(a)(2) of the CWA.[7] FB at 13-17. Virginia Beach makes essentially the same concessions.[8]

---

[7] The government, Virginia Beach and Virginia all note that North Carolina sought assistance from EPA under Section 401(a)(2) during the COE proceeding which resulted in the issuance of a dredge and fill permit authorizing the construction of the intake structure in Virginia. FB at 16; VBB at 22; VB at 12. These parties are correct that for the purposes of that proceeding, North Carolina was indeed a downstream State whose only remedy was under Section 401(a)(2). The circumstances are entirely different in the FERC proceeding, which authorizes an activity which involves a discharge *in*, not upstream of, North Carolina.

[8] Virginia Beach affirms that (i) "water withdrawal projects do and will continue to require State certification"; (ii) construction of intake structures

(Footnote continued)

Having thus conceded that Section 401 applies broadly and generally to the construction and operation of almost any facility or the performance of any activity which might originate or affect the discharge from a hydroelectric project, the essence of the government's (and Virginia Beach's) argument boils down to a simple proposition: the States' virtually uncircumscribed authority under Section 401(a)(1) may be usurped in the "limited" context of FERC license amendments occurring in the interval between licensing and relicensing which are not governed by a preexisting State Section 401(a)(1) certification condition and which *FERC* finds will not have a "material adverse impact" on water quality.

That is not a rational reading of the statute. If States have Section 401(a)(1) certification rights in all of the circumstances cataloged by the government (and Virginia Beach) -- and they do -- they must have those same rights in this case. If, for example, a State has the right to impose minimum flow conditions effectively controlling future water withdrawals at the time of initial licensing and those conditions cannot be abrogated by a *future* license amendment, then the State surely must have the same right in a *future* license amendment proceeding. Similarly, if a State has the right to restrict *future* water withdrawals at relicensing -- when no substances are being added to the water, no additional facilities are being constructed, and no alterations in the discharge are occurring -- then it surely must have that same right during a license amendment proceeding prior to

(Footnote continued)

requires certification; (iii) "any new activity that requires a new federal license or permit, and that affects water quality, will also involve a new discharge and a State certification"; (iv) States can "protect against future *alterations*" via Section 401(d) conditions; (v) "States have ample authority to protect themselves against adverse effects of future *changes* in a certified project"; and (vi) "increased discharge[s] may well" require certification. VBB at 11, 12, 12 n.6, 17 (emphasis in original).

relicensing. Indeed, it is nonsensical to concede that a State may effectively control future withdrawals at the time of licensing and relicensing, but not in the 50-year interval between those events.

CONCLUSION

The government has effectively conceded that the decision below is erroneous and inconsistent with controlling precedent, and has argued unpersuasively that the impact of its limitation on CWA certification rights will be limited. The Court need not look beyond the fact that 40 States supported North Carolina below and 21 States have filed an *amicus* brief in support of North Carolina's Petition to discern the hollowness of the government's contention. This is not (as Virginia Beach suggests (VBB at 11)) a "routine case" unworthy of this Court's attention. The rights at stake here are fundamental rights of each State to assure the quality of the waters within its borders. Arguments that courts can carve out "limited" exceptions to statutes as comprehensive as the CWA, and decisions that draw illogical distinctions between additions and reductions to flow, when both have been

determined by this Court to affect water quality, should not be permitted to stand without review by this Court.

For the foregoing reasons, North Carolina's Petition for a Writ of Certiorari should be granted.

February 2, 1998

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OCT 24 1996

Honorable Lois D. Cashell
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Re: Virginia Electric and Power Co., "Order Approving Non-Project Use of Project Lands and Waters and Amending License," Project No. 2009-003, 72 F.E.R.C. ¶ 61,075 (July 26, 1995), reh'g denied, 72 F.E.R.C. ¶ 61,283 (Sept. 22, 1995), on appeal, State of North Carolina v. FERC, No. 95-1494 (D.C. Cir.).

Dear Ms. Cashell:

On September 11, 1996, the United States Court of Appeals for the District of Columbia Circuit remanded the above-captioned order to the Commission to determine whether the order requires a certification from the State of North Carolina pursuant to Section 401(a)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1341(a)(1). The court's question, which requires an analysis of the term "discharge" as it appears in Section 401, goes directly to the jurisdictional reach of Section 401, a provision of the CWA which the U.S. Environmental Protection Agency believes is of vital importance to the nation's program to protect water quality.

We are therefore writing to express the views of EPA on this important question. For the reasons set out below, it is EPA's position that the license amended in this proceeding results in a discharge to North Carolina waters and thus

triggers the requirement of a Section 401 certification from that State. We request that you provide this letter to the Commission for its consideration as it responds to the court's order.

Background

Relevant Statutory Provisions

Section 401(a)(1) of the CWA provides that

> [A]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with [the effluent limitations and water quality requirements of the CWA].

33 U.S.C. § 1341(a) (1) (emphasis added).

Under Section 401(a)(2) of the CWA, the agency issuing a federal license must "immediately notify" EPA of its receipt of a license application and Section 401 certification. If EPA determines that the discharge may affect the water quality of another State, it must notify the federal agency, the affected State, and the applicant. If the affected State determines that the proposed discharge will violate its water quality requirements, it may object to the issuance of the permit and request a hearing to determine the appropriate conditions to be placed in the license to resolve the concerns of the affected State.

A 1978 EPA General Counsel opinion and relevant case law make clear that only the State where the "discharge" occurs -- not the State where the facility is located (if different), and not any other States where there are water

quality impacts -- has the authority to certify under Section 401(a)(1). EPA General Counsel Opinion 78-8; NWF v. FERC, 912 F.2d 1471, 1483 (D.C. Cir. 1991); but cf. Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Engineers, 526 F.Supp. 1063, 1075 (W.D. Pa. 1981), aff'd mem., 707 F.2d 1392 (3d. Cir.), cert. denied, 464 U.S. 915 (1983) (misreading EPA's 1978 opinion to mandate certification from the State where the facility is located). States whose water quality may be affected by a discharge must rely on Section 401(a) (2).

Facts of This Case

On July 26, 1995, the Commission issued an order approving the application of the Virginia Electric and Power Company ("VEPCO") for a non-project use of the lands and waters associated with the Gaston and Roanoke Rapids Project (No. 2009), and amending the project license to accomodate that use. Among other things, the order approved the withdrawal of up to 60 million gallons per day of water from the Lake Gaston reservoir and a modified operation of the Roanoke Rapids dam to reflect that withdrawal, subject to several conditions that were added to the license. The water in the Lake Gaston Reservoir ultimately flows through the Roanoke Rapids dam, which is in North Carolina.

The Commission, in its decision, rejected the argument raised by North Carolina that the license amendment was invalid because North Carolina had failed to certify the amendment under Section 401. The Commission stated that, "even assuming, arguendo, that the proposed amendment to the Project No. 2009 license ... is subject to the provisions of section 401(a)(1)," the amendment would have "no material adverse impact" on North Carolina water quality, and thus certification was not needed under Commission regulations. 72 F.E.R.C. at 61,393-94 (citing 18 C.F.R. § 4.38 (f)(7)(iii)).

The State of North Carolina and the Roanoke River Basin Association petitioned the United States Court of Appeals for the D.C. Circuit to review the Commission's order amending the project license. After briefing and oral argument, the court issued a brief order explaining that

> [the] language [of the Commission's order] leaves unresolved the question of whether § 401(a)(1) applies to require a certification from North Carolina, insofar as the Commission 'assum[ed], arguendo' that the answer was 'yes' and proceeded to rest its action on ... its regulations. ... [T]he Court believes that in the interest of judicial economy the Commission should answer this question before we ... review ... the other issues of the case.

State of North Carolina v. FERC, No. 95-1494 (D.C. Cir. Sept 11, 1996), Order at 2.

Interests of the Environmental Protection Agency

The Supreme Court has described the Clean Water Act as a "comprehensive water quality statute designed to restore the chemical, physical and biological integrity of the Nation's waters." PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology, __ U.S. __, 114 S.Ct. 1900, 1905 (1994) ("PUD") (quoting CWA Section 101(a), 33 U.S.C. § 1251(a)). And, in the process of achieving this ambitious goal, "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Section 401 is one of the most critical authorities States have under the CWA to ensure the protection of water quality and the elimination of water pollution. See, e.g., United States v. Puerto Rico, 721 F.2d 832, 838 (1st Cir. 1983); Mobil Oil Corp. v. Kelley, 426 F.Supp. 230, 234-35 (S.D. Ala. 1976).

EPA maintains a strong interest in ensuring the rights of States under the CWA to protect and maintain their water quality. As the Agency charged with administration of the Clean Water Act, EPA's views as to the scope of Section 401 are clearly entitled to deference. PUD, 114 S.Ct. at 1909; see also, Arkansas v. Oklahoma, 503 U.S. 91, 107 (1992).

Analysis

Does the License Amendment Trigger an Obligation to Obtain CWA Section 401 Certification from North Carolina?

Given the explicit language of Section 401(a)(1), it is unquestionable that the Commission's license for the Lake Gaston project results in a discharge originating in North Carolina. To repeat that language, "any applicant for a Federal license or permit to conduct any activity ... which may result in a discharge" shall obtain a Section 401 certification from the State "in which the discharge originates" (emphasis added). VEPCO's license for Project No. 2009 authorizes it to "conduct the activity" of operating the Roanoke Rapids dam to generate electric power. That activity "may result," and indeed, does result, in a "discharge" of water over and through the dam. See PUD, 114 S.Ct. at 1908 (discharge of water from the tailrace of a hydroelectric project is within the scope of Section 401). Thus, the license, and amendments thereto, trigger the requirement of a Section 401 certification from North Carolina.

Although the Commission expressly declined to rule on the issue, some parties have argued that the license amendment would result in no discharge in North Carolina's waters because the "activity" being conducted pursuant to the license amendment is the withdrawal of water from Lake Gaston. Since a withdrawal of water is not a "discharge" within the meaning of Section 401, PUD, 114 S.Ct. at 1908, it

has been asserted that the license amendment will not result in a discharge in North Carolina.

This argument misunderstands the Supreme Court's decision in PUD. In PUD, the water returned to the stream after use for power generation was a "discharge" of water that triggered Section 401(a)(1). The Court correctly noted that the alleged water quality problem (reduction in flow prior to the return point) was not a result of the discharge of water at the return point, but of the withdrawal of water upstream. Id. at 1908-09. Nonetheless, the release of water from the tailrace of the hydroelectric facility was a "discharge" which triggered Section 401(a)(1). The operation of the facility was the "activity" being licensed by the Commission for which Section 401 certification was required in PUD. Similarly, in this case, although the amendment of VEPCO's license addresses the proposed withdrawal of water, the Commission's license being amended authorizes the "activity" of operating the hydroelectric facility which discharges into North Carolina waters.

EPA also disagrees with the argument that North Carolina would not be able to use its certification authority to address alleged water quality problems associated with the withdrawal of water from Lake Gaston. In PUD, the Supreme Court held that once a federal license triggers a Section 401 certification obligation due to the existence of a discharge, the certifying State may address any aspect of the licensed activity which may affect State water quality standards, including reductions in stream flow associated with the project. 114 S.Ct. at 1909. The license amendment will result in reductions in stream flow from the dam in North Carolina. In light of PUD, the reductions in stream flow could be scrutinized by North Carolina as part of a Section 401 review to assure compliance with its water quality standards.

Finally, EPA disagrees with the contention that Section 401 certification is not required because, it is alleged, there will be no change to the "activity" of operating the hydroelectric project due to the amendment of the license. First of all, it is clear that the license amendment alters the terms of operation of the dam in North Carolina -- the activity that results in a discharge. As the Commission noted, the project use which mandated the license amendment will cause a reduction in flow from the Roanoke Rapids dam, 71 F.E.R.C. at 61,394. Indeed, the Commission amended the license to add a provision to ensure the mitigation of downstream impacts or fishery resources due to the proposed withdrawal.

In any event, EPA wishes to emphasize that even if there were no change to the licensed activity, Section 401 would be triggered by issuance of a license. Section 401 certification is required whenever a federal license is issued that applies to any activity, including an ongoing activity, which "may result" in a discharge. Furthermore, EPA, U.S. Army Corps of Engineers, and Commission regulations all require Section 401 certifications for licensing of ongoing activities and discharges and amendments to such licenses. 18 C.F.R. § 4.38(f)(7); 33 C.F.R. § 325.2(b)(1); 40 C.F.R. §§ 122.62, 124.53, 124.55(e). Under the explicit language of Section 401(a)(1) , it does not matter that the activity, or the discharge from that activity, was occurring prior to issuance of the federal license, since "any applicant" for a federal license "which may result in a discharge" must obtain a Section 401 certification.[1]

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[1]. In its decision, the Commission, "assuming" the existence of a discharge, ruled that North Carolina was nonetheless barred from certifying under Section 401 in light of the Commission's regulation governing certification requirements in license amendment proceedings,

(Footnote continued)

In EPA's view, the amendment of the license to operate the Lake Gaston hydroelectric project results in a discharge to North Carolina waters within the meaning of Section 401 of the CWA.

Thank you for your consideration of the views expressed in this letter.

Sincerely yours,

s/ Jonathan Z. Cannon

Jonathan Z. Cannon
General Counsel

s/ Bob Perciasepe

Robert Perciasepe
Assistant Administrator for Water

cc: Carol M. Browner
Lois Schiffer
Parties to Proceeding

(Footnote continued)

18 C.F.R. § 4.38(f)(7)(iii). EPA expresses no position here on this aspect of the Commission's decision, nor does EPA intend to express views on the impacts of the amended license on North Carolina water quality beyond those already in the record.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 1997

OFFICE OF
GENERAL COUNSEL

To: Parties on Service List

Re: State of North Carolina v. FERC, No. 95-1494 (D.C. Cir.) (and consolidated case)

Dear Sir or Madame:

I am enclosing for your information a letter from EPA to the Attorney General of Virginia explaining the Agency's position regarding the application of Section 401 of the Clean Water Act to license amendments, as set forth in the amicus brief recently filed by the United States in this proceeding.

Sincerely,

s/Jonathan Z. Cannon

Jonathan Z. Cannon
General Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 16 1997

OFFICE OF
GENERAL COUNSEL

The Honorable James S. Gilmore, III
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219

Re: State of North Carolina v. Federal Energy Regulatory Commission, No. 95-1494 (D.C. Cir.) (and consolidated case)

Dear General Gilmore:

We are writing in reference to your letters of January 3, 1997 to the Attorneys General of the States who joined in an amicus curiae brief in the above-captioned case, which involves the rights of States under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. With all due respect, we do not believe your letters fairly represent the views of EPA set forth in the amicus brief filed by the United States in this case. Although the letters were not addressed to EPA, they seek to characterize EPA's position in this important matter in a way which may engender confusion, and therefore require a response.

EPA views Section 401 of the Clean Water Act as a provision of vital importance to the nation's program to protect

water quality. Section 401 is one of the most important authorities afforded States under the Act to ensure the protection of water quality and the elimination of water pollution within their boundaries. EPA has consistently sought to preserve and strengthen the rights of States to protect and maintain their water quality under the provisions of the Clean Water Act, particularly Section 401.

The key issue in this litigation, as you know, concerns the rights of States to provide certification under Section 401 in the context of amendments to federal licenses or permits. The application of State certification authority to amended licenses or permits is not explicitly addressed by the language of Section 401. EPA believes, however, that preserving the States' authority to certify to an amended license or permit is critical to full implementation of the goals and purposes of Section 401 and the Clean Water Act. It was for this reason that the agency, through the United States Department of Justice, presented its views to the court.

As the brief of the United States makes clear, where a license amendment adversely affects water quality due to changes in the original discharge -- that is, the discharge or discharges that result or may result from the activity subject to a federal license or permit as a whole -- certification by the State where the original discharge occurs is required. Brief of United States at 8. This interpretation is essential to ensure that amendments to federal licenses or permits are not used as a mechanism to avoid State certification of changes to federally-licensed activities which may adversely affect water quality. A contrary view, precluding States from reviewing the impacts of license amendments on their water quality except where the amendment itself caused a new discharge, would undermine the authority of the States to protect their water quality, and would invite abuse. The United States' brief squarely rejects such a view, and it is our understanding that

FERC's brief agrees with the position taken by the United States on this critical point.

Although in our view this is the central issue in this litigation that may affect States' rights under Section 401, your letter does not refer to it. Instead, your letter asserts that the United States' amicus brief supports FERC in this litigation, rejects the position taken by EPA in the letter it filed with FERC regarding these issues on October 24, 1996, and demonstrates that North Carolina's position in this case is "both unsupportable and now unsupported by any federal agency." We believe that these characterizations of the United States' brief are inaccurate and unfair.

First, the United States' brief was not intended to, and does not, take a position regarding who should prevail in this litigation. On the central issue, the brief explicitly states that "North Carolina's 401(a)(1) rights turn on whether the amendment adversely affects the original discharge in North Carolina." United States' brief at 10. The United States and EPA do not, however, take any position on that factual issue, nor on the validity of FERC's regulation governing license amendments. See United States' brief at 4 n.1. (EPA expresses no position here on FERC's factual conclusions."); 9 n.6 ("EPA expresses no view on the validity of FERC's specific regulation, other than to say that FERC has properly concluded that where a license is amended the question of adverse impact on the original discharge must be examined."). The United States' brief concludes: "If the court sustains FERC on this issue, it may conclude that further certification from North Carolina is not necessary in order for the license amendment to be lawfully issued." United States' brief at 10. It follows equally, however, that if the court does not sustain FERC with respect to the validity of its regulation or its conclusions regarding the effect of the license amendment, further certification may be required.

Second, the United States' brief does not "reject" EPA's October 24 letter. Rather, the brief rejects FERC's sweeping characterization of that letter as mandating that '"any amendment to a license triggers a requirement for CWA Section 401(a)(1) certification even absent any nexus at all between the amendment and water quality."' United States' brief at 4 n.1, quoting from FERC Order on Remand, p. 16 (emphasis in original). As the United States' brief indicates, this is not EPA's view; the statements in EPA's letter which were misconstrued by FERC addressed the issuance of a license, not amendments to licenses, and were intended to rebut the claim, made by others, that 401 certification did not apply to relicensing of ongoing activities. See Letter from Jonathan Z. Cannon and Robert Perciasepe to Lois D. Cashell (October 24, 1996), at 5. With respect to amendments to licenses, EPA's view is that set forth in the United States' brief: a State's right to certify amendments depends upon whether changes to the original discharge under the license may have an adverse impact upon water quality within the State. Apart from that clarification, the United States' brief does not change the basic premise of EPA's October 24 letter that Section 401 is implicated by amendments to licenses.

We hope that this letter is helpful to you in understanding EPA's views on this important matter. We look forward to continuing to work closely with you and with the responsible officials of the other States to ensure that Section 401 affords the States an effective mechanism to protect the quality of their waters.

Sincerely yours,

s/Jonathan Z. Cannon

Jonathan Z. Cannon
General Counsel

s/Bob Perciasepe

Robert Perciasepe
Assistant Administrator for
Water

cc: Amici Attorneys General